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Office of Administrative Law Judges
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Issue Date: 16 March 2004

Case No.: 1999-ERA-0025

In the Matter of:

CURTIS C. OVERALL,
Complainant

v.

TENNESSEE VALLEY AUTHORITY - WATTS BAR NUCLEAR PLANT,
Respondent

APPEARANCES:

Lynn Bernabei, Esq. and
Alan R. Kabat, Esq.,
For the Complainant

Brent R. Marquand, Esq. and
Dillis Freeman, Esq.,
For the Respondent

BEFORE: Robert L. Hillyard
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This action arises from a complaint filed by Curtis C. Overall on February 19, 1999, under the employee protection provisions of the Energy Reorganization Act of 1974, as amended ("ERA"), 42 U.S.C. § 5851, and the implementing regulations of 29 C.F.R. Part 24. The employee protection provisions of the above-referenced statute and the implementing regulations thereunder prohibit an employer from taking adverse employment action against an employee relating to the employee's compensation, terms, conditions, or privileges of employment, in retaliation for the employee's assistance or participation in a proceeding, or any other action that furthers the purposes of the environmental statutes at issue. 29 C.F.R. § 24.2 (a).

A formal hearing was conducted over a period of four weeks in Washington, D.C. and Knoxville, Tennessee. The hearing in Washington, D.C. was held from April 17 through April 19, 2001. The hearing in Knoxville, Tennessee, was held from April 23

through April 27, 2001; from May 7 through May 11, 2001; and from May 23 through May 24, 2001. Each of the parties was afforded a full opportunity to present evidence and argument at the hearing as provided in the Act and the regulations issued thereunder. The findings and conclusions which follow are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon a careful analysis of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent case law. Both parties have filed extensive post-hearing briefs, which have been considered.

I. STATEMENT OF THE CASE

The Complainant, Curtis C. Overall ("Overall" or "Complainant"), filed a second complaint, the subject of this Recommended Decision and Order, with the Wage and Hour Division of the U.S. Department of Labor on February 19, 1999. In order to put the current complaint in context and have a better understanding of the proceedings, a brief history of the first complaint must be given.

Overall filed his first complaint with the Wage and Hour Division on January 15, 1997, in which he alleged that his employer, Tennessee Valley Authority ("TVA" or "Respondent"), unlawfully terminated him from his position at its Watts Bar Nuclear Facility ("Watts Bar"), because of safety issues raised regarding broken screws found in an ice basket condenser unit. A formal hearing was held before Administrative Law Judge Clement J. Kennington who issued a Recommended Decision and Order on April 1, 1998, in which he found that TVA intentionally discriminated and retaliated against Overall for engaging in protected activity (CX 17).[1] Judge Kennington ordered TVA to reinstate Overall to his former position or to a substantially equivalent position, and he awarded back pay, costs, attorney's fees, and compensatory damages (CX 17; RDO, p. 36). On appeal

[1] In this Decision and Order, "ALJX" refers to administrative file exhibits, "CX" refers to the Complainant's Exhibits, "RX" refers to the Respondent's Exhibits, "RDO" refers to Judge Kennington's April 1, 1998 Recommended Decision and Order, "FoF" refers to the Findings of Fact contained in this Recommended Decision and Order; "DC Tr." refers to the transcript of the hearing held from April 17, 2001 through April 19, 2001 in Washington, D.C., consisting of pages 1-500; and, "TN Tr." refers to the transcript of the hearing held between April 23 through May 24, 2001, in Knoxville, Tennessee, consisting of pages 1-3025. Where a name precedes the transcript designation (e.g. – "Overall, D.C. Tr. at 455"), the listed name cites to the direct testimony of the person listed. Where the name listed is "Overall," the testimony is from Curtis Overall, Complainant. Where other Overall family members' testimony is utilized, a first name will be given.

by TVA, Judge Kennington's Recommended Decision and Order, was affirmed by the Administrative Review Board on April 30, 2001, and by the Sixth Circuit Court of Appeals on March 6, 2003.[2]

Overall returned to work at Watts Bar on August 5, 1998. On February 19, 1999, Overall filed the instant complaint with the Occupational Safety and Health Administration ("OSHA"), pursuant to Section 211 of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5851.[3] He alleged that following reinstatement, TVA engaged in retaliatory harassment and discrimination against him, in violation of Judge Kennington's Decision and Order, by failing to prevent a hostile work environment, by failing to prevent retaliatory harassment outside the workplace and by failing to conduct an adequate investigation of the incidents of alleged retaliatory harassment which occurred following his reinstatement at Watts Bar (ALJX 1).

After an investigation, OSHA issued a determination dated July 27, 1999, finding that TVA did not discriminate or retaliate against Overall (ALJX 1). Overall appealed and requested a formal hearing (ALJX 2). The file was transferred to the Office of Administrative Law Judges in Cincinnati, Ohio on August 6, 1999 (ALJX 1). A Notice of Hearing and Prehearing Order was issued on September 24, 1999 (ALJX 4). A formal hearing was held before the undersigned Administrative Law Judge from April 17-19, 2001, in Washington D.C., and from April 23-27, 2001, from May 7-11, 2001, and from May 23-24, 2001, in Knoxville, Tennessee.

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[2] On March 11, 2003, the Complainant filed a Notice of New Authority, which included a copy of the Sixth Circuit Court of Appeals decision in *Tennessee Valley Authority v. United States Dept. of Labor,* No. 01-3724 (Mar. 6, 2003). I take notice of this final decision while noting the Respondent's argument that incidents occurring in 1995 do not require a finding that further discrimination must have occurred in 1998-2000 (*See* Respondent Tennessee Valley Authority's Response to Complainant's Notice of New Authority, March 28, 2003).

[3] On December 6, 1999, Overall filed a related complaint with OSHA, alleging that TVA discriminated against him by suspending and denying his security clearance. Following the reinstatement of his security clearance, Overall withdrew the complaint (ALJX 11).

Overall's Motion to Supplement the Record

On August 7, 2003, counsel for Overall filed Complainant Curtis C. Overall's Motion to Supplement the Record, seeking to admit into evidence a memorandum from John A. Scalice, TVA's Chief Nuclear Officer and Executive Vice-President to Craven Crowell, then-Chair of TVA's Board of Directors. The memorandum was entitled "Minutes of Meeting No. 39 of the Watts Bar Nuclear Safety Review Board," dated May 20-21, 1999.

Overall seeks to admit this memorandum pursuant to 29 C.R.F. § 18.54(c), which states that "once the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record." 29 C.F.R. § 1854(c). Overall alleges that this document was not available to the Complainant until after the close of the record as TVA did not produce this document during discovery (Complainant Curtis C. Overall's Motion to Supplement the Record, pp. 3-4). He further alleges that the proposed memorandum is material in that it shows that "TVA was seriously concerned about ice condenser problems at Watts Bar that arose from Mr. Overall's reports…." (*Id*. at 4).

TVA argues in response that the meeting in question occurred months after all of the events at issue in this case had taken place. (*See* Tennessee Valley Authority's Response to Motion to Supplement the Record, p. 1, filed August 15, 2003). TVA asserts that the memorandum in question does not relate to any events associated with this claim, that the document does not mention the Complainant or his situation, and that there is no discussion in the memorandum of the ice basket screws reported by Overall (*Id*.)

TVA's argument has merit. Unlike later-admitted exhibits, RX 253 and RX 254, (*see* full discussion at fn. 4, 5) which were not in existence at the time of the hearing, this document was produced in 1999, well before the record was closed. As such, it is not new evidence as foreseen by § 18.54(c). More importantly, however, the proffered memorandum is not material to this case. Nowhere in the memorandum is there any discussion of protected activity, retaliatory or discriminatory conduct, no statements that would be relevant to a hostile work environment, no discussion of adverse employment actions, no discussion of the ice basket screws reported by Overall and there is no discussion of Overall, his situation, or whistleblowing. Even had the evidence been incorrectly withheld during discovery, it is not material to any issue before this Court. Therefore,

Complainant's Motion to Supplement the Record pursuant to § 18.54(c) is denied.

TVA's June 25, 2003 Motion to Dismiss

On June 25, 2003, TVA filed a Motion to Dismiss, based on the ARB's decision in *Pastor v. Dept. of Veterans Affairs,* ARB No. 99-071, ALJ No. 99-ERA-11 (ARB May 30, 2003). TVA argues that the instant claim should be dismissed for lack of jurisdiction, as: (1) TVA is an agency of the Federal Government; and, (2) Since Congress did not waive sovereign immunity from monetary damage claims filed under § 211(b) of the Energy Reorganization Act, 42 U.S.C. § 5851(b), the Department of Labor has no jurisdiction to adjudicate this claim.

Overall filed Complainant's Response to Respondent Tennessee Valley Authority's Motion to Dismiss on July 11, 2003, in which he argues that TVA's Motion to Dismiss should be denied, because: (1) Overall's discrimination and harassment claims against TVA arose from TVA's commercial activities relating to electric power generation, not from its discretionary governmental functions, and therefore, TVA was not operating under sovereign immunity; and, (2) Even if TVA had sovereign immunity, TVA's enabling statute provides that TVA may sue and be sued, thereby expressly waiving any existing sovereign immunity protection.

"Jurisdiction to issue [a] final agency order in a case does not necessarily include jurisdiction to decide the case on its merits. [J]urisdiction may sometimes extend only to deciding whether [a court lacks] jurisdiction over the substance of the claim." *Cf. United States v. Mine Workers*, 330 U.S. 258, 291, 67 S. Ct. 677 (1947).

The proposition that the United States Government and its agencies cannot be sued except by consent is deeply rooted in our jurisprudence. "The United States, as sovereign, 'is immune from suit, save as it consents to be sued … and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *United States v. Testan*, 424 U.S. 392, 399, 96 S. Ct. 948, 953 (1976)(quoting *United States v. Sherwood*, 312 U.S. 584, 586, 61 S. Ct. 767, 769 (1941)). The ARB has previously applied sovereign immunity analysis to ERA proceedings. *See, e.g., Pogue v. United States Dep't of the Navy*, 87-ERA-21 (Sec'y May 10, 1990); *In re Teles*, 94-ERA-22 (Sec'y Aug. 8, 1995).

Overall argues that TVA does not have sovereign immunity because the operation of Watts Bar Nuclear Power Plant is a

commercial activity, not a discretionary governmental function (*See* Complainant's Response to Respondent Tennessee Valley Authority's Motion to Dismiss, p. 4). In *Pastor v. Department of Veterans Affairs,* the ARB discussed the Supreme Court's standards governing waiver of sovereign immunity. *Pastor*, No. 99-071 (ARB May 30, 2003). The ARB noted that the United States, as sovereign, is immune from suit in administrative adjudications as well as in Article III adjudications unless it explicitly consents to be sued. *Pastor,* No. 99-071 at 3-4.

Contrary to the Complainant's argument, TVA's sovereign immunity is based not on whether it is performing a discretionary governmental function, but rather on whether it has explicitly consented to be sued for monetary damages. In *Pastor,* the complainant sought monetary damages only, not reinstatement. *Pastor*, No. 99-071 at 4. Similarly, Overall seeks monetary damages only, asserting that reinstatement at TVA Nuclear facilities would be inappropriate, and that he is currently employed at TVA's Fossil Power Group Division in Chattanooga, Tennessee. (Complainant's Post-Hearing Brief, p. 197). Therefore, a discretionary governmental functions analysis is inappropriate in this case. TVA, as an agency of the Federal Government, has sovereign immunity.

Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit. *Loeffler v. Frank*, 486, U.S. 549, 554, 108 S. Ct. 1965, 1968 (1988); *Federal Housing Administration v. Burr*, 309 U.S. 242, 244, 60 S. Ct. 488, 490 (1940). To be effective, waivers of the Government's sovereign immunity must be "unequivocally expressed." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95, 111 S. Ct. 453, 457 (1990)(quoting *United States v. Mitchell*, 445 U.S. 535, 538, 100 S. Ct. 1349, 1351 (1980), and *United States v. King*, 395 U.S. 1, 4, 89 S. Ct. 1501, 1502 (1969). "The 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text." *Lane v. Pena*, 518 U.S. 187, 192, 116 S. Ct. 2092, 2097 (1996)(quoting *United States v. Nordic Village, Inc.*, 503 U.S. 30, 37, 112 S. Ct. 1011, 1016 (1992); *accord, Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 119 S.Ct. 687 (1999).

Under TVA's "sue and be sued" clause, 16 U.S.C. § 831c(b), TVA has waived sovereign immunity as Congress provided expressly that the TVA may be sued. *Queen v. TVA*, 689 F.2d 80, 85 (6th Cir. 1982). The Supreme Court has stated that "sue and be sued" clauses should be construed broadly. *Burr*, 309 U.S. at 245. This clause imposes amenability to suit upon TVA notwithstanding the Authority's protestations of immunity. *See, e.g., United States v. Smith*, 499 U.S. 160, 168-169 (1992)("TVA itself '[m]ay

sue and be sued in its corporate name.' … Courts have read this 'sue or be sued' clause as making the TVA liable to suit in tort subject to certain exceptions"); *People's Nat'l Bank of Huntsville, Ala. v. Meredith*, 812 F.2d 682, 684 (11th Cir. 1987)("we note that the doctrine of sovereign immunity does not bar suit against TVA"); *Algernon Blair Indus. Contractors, Inc. v. TVA*, 552 F. Supp. 972, 974 (M.D. Ala. 1982)("TVA has always been liable to direct lawsuit like any other litigant."); *Smith v. TVA*, 436 F. Supp. 151, 154 (E.D. Tenn 1977)("TVA may be sued on the basis of strict liability"); *Brewer v. Sheco Constr. Co.*, 327 F. Supp. 1017, 1018 (W.D. Ky 1971)(holding that TVA's "liability is to be derived solely from section 831c(b) of Title 16"); *Latch v. TVA*, 312 F. Supp. 1069, 1072 (N.D. Miss. 1970)("Clearly [§] 831c(b) relinquished any sovereign immunity which TVA might have had as a government agency or corporation for proprietary functions by rendering it liable to direct lawsuit like any other litigant."); and, *Adams v. TVA*, 254 F. Supp. 78, 80 (E.D. Tenn 1966)("This is a simple case of damages against the TVA, which by statute may be sued in its corporate name.").

Given the unequivocal statutory waivers in 16 U.S.C. § 831c(b) and the supporting case law discussed above, I find that TVA has waived its sovereign immunity and can be sued as any other corporation.

The analysis, however, is not complete at this point. The first inquiry is whether or not there has been a waiver of sovereign immunity. When there has been such a waiver, the second inquiry comes into play – that is, whether the source of substantive law upon which the claimant relies provides an avenue for relief. *United States v. Mitchell*, 463 U.S. 206, 216, 218 (1983). A waiver of sovereign immunity does not create a cause of action; rather a substantive right to monetary relief must be found in some other source of law. *Id.*

"To sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims." *Lane*, 518 U.S. at 192. In *Pastor*, the ARB held that Congress did not unambiguously waive sovereign immunity from monetary damage claims filed under § 5851 of the ERA. *Pastor*, No. 99-071 at 23. The Secretary of Labor, therefore, did not have jurisdiction to adjudicate the claim in *Pastor*, and the ARB, as the Secretary's delegate, did not have jurisdiction to decide the appeal. *Id.*

In *Pastor*, the ARB examined the specific language and structure of § 5851, the employee protection provision of the

ERA, focusing on the distinction between the terms "employer" and "person," as used in § 5851. *Pastor*, No. 99-071 at 15.

> A well understood principle of statutory construction is that to the extent possible all Congressional provisions are to be given meaning and that when Congress uses two different words in close proximity, the use of different words indicates a difference in meaning … Congress' use of different nouns in the two provisions ('employer' in § 5851(a) and 'person' in § 5851(b)) indicates that Congress did not have the same population in mind in each.

Pastor, No. 99-071 at 16.

Section 5851(a)(2), the nondiscrimination provision of the ERA, prohibits an "employer" from discriminating against any employee who engages in certain whistleblowing activities. *Id.* Section 5851(b), the remedies provision of the ERA, uses the term "person," instead of the term "employer," in describing the party against whom damages may be assessed. *Id.* at 15.

Section 5851(a)(2)(a)'s definition of "employer" includes licensees of the NRC. In *Pastor*, the Department of Veterans Affairs, ("DVA"), conceded that it was an "employer" within the meaning of § 5851(a) because it was a licensee of the NRC. *Pastor*, No. 99-071 at 13. DVA submitted, however, that being an employer was not enough to make DVA liable for monetary damages. *Id.* DVA contended that § 5851(b)(2)(B) was inapplicable to federal agencies because it applied to "persons." In order for the United States to have waived sovereign immunity for monetary damages, DVA argued, the term "person" in § 5851(b)(2)(B) would have to be synonymous and interchangeable with the term "employer" in § 5851(a). Since § 5851 contains no definition of the word "person," Congress had not clearly and unequivocally articulated that it intended for the United States to be liable for the payment of compensatory damages. *Id.*

The term "person" is used only in the subsections of § 5851 which establish procedures for evaluating and remedying discrimination against whistleblowers. Subsection 5851(b) establishes a system for investigating and adjudicating complaints filed by "any employee" who believes he has been discriminated by "any person" in violation of § 5851(a). When the Secretary of Labor finds such discrimination has occurred, § 5851(b)(2)(B) empowers the Secretary to order "the person who committed such violation" to provide certain remedies, including compensatory damages. Subsection 5851(c) enables any "person" adversely affected or aggrieved by an order issued under

subsection (b) to obtain judicial review in the circuit in which the violation allegedly occurred. Subsection 5851(d) (jurisdiction) authorizes the Secretary to file a civil action "whenever a person has failed to comply" with the Secretary's order, and § 5851(e) authorizes a person on whose behalf an order was issued to commence a civil action "against the person" to whom such order was issued.

Thus, seemingly, under § 5851, all "employers" are prohibited from discriminating against whistleblowers, but only "persons" who discriminate against employees are subject to the process and remedies provided.

The word "person" is a term of art often used to exclude the Federal Government. It is "a longstanding interpretive presumption that 'person' does not include the sovereign." *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765, 780, 120 S. Ct. 1858, 1866 (2000). To be sure, Congress can override that presumption simply by expressly defining the word "person" to include the Federal Government. *Cf. Dep't of Energy v. Ohio*, 503 U.S. at 618, 112 S. Ct. at 1635 (noting sections in the CWA and RCRA in which Congress specifically defined "person" to include the United States and thereby showed intent to waive sovereign immunity for purposes of those sections). Congress did not, however, choose to expressly redefine "person" in the ERA as including the United States or federal agencies. *Pastor*, No. 99-071 at 18.

Accordingly, the *Pastor* court held that since the term "person" in § 5851 did not include the Federal Government, and as such, did not expressly waive sovereign immunity with respect to monetary damages under § 5851, the Board did not have jurisdiction to hear the claim as the Department of Veterans Affairs was immune from suit.

TVA asserts that this was a correct interpretation by the ARB, and offers *Flamingo Industries, Ltd. v. United States Postal Service*, 2004 WL 344016 (U.S.) in support of its position. In that case, decided on February 25, 2004, by the United States Supreme Court, the Solicitor General argued that a 'sue-and-be-sued' clause is insufficient, in and of itself, to create substantive liability on the part of an agency of the United States. *See Flamingo Industries, Ltd.*, No. 02-1290, Solicitor's Brief, p. 18. Such a clause, the Solicitor argued, did not render a federal agency a "person" under the antitrust laws at issue in that case. *Id.* at 17.

The Supreme Court agreed, stating that:

> The Sherman Act defines 'person' to include corporations, and had the Congress chosen to create the Postal Service as a federal corporation, we would have to ask whether the Sherman Act's definition extends to the federal entity under this part of the definitional text. Congress, however, declined to create the Postal Service as a Government corporation, opting instead for an independent establishment. … [Therefore,] absent an express statement from Congress that the Postal Service can be sued for antitrust violations despite its status as an independent establishment of the Government of the United States, the PRA [Postal Reorganization Act of 1971] does not subject the Postal Service to antitrust liability.

Flamingo Industries (USA) Ltd, 2004 WL 344016 at *8.

Overall distinguishes the current case from *Flamingo Industries, Ltd.,* by correctly pointing out that the plaintiff in *Flamingo Industries, Ltd.,* had at least three alternative statutory and administrative venues for challenging the action of the U.S. Postal Service, so that recourse to statutory construction of the antitrust laws at issue in the case was unnecessary. As the Solicitor General in *Flamingo Industries, Ltd.*, argued, the availability of alternative venues provided the "Respondents … specific statutory means to seek relief for their alleged injuries…." *See* Solicitor's Brief at 33. Here, Overall has no such alternative "statutory means" by which he can seek relief for alleged retaliation and harassment suffered as a result of his engagement in protected activity under the ERA.

Overall alleges that TVA's failure to raise a sovereign immunity argument in prior cases demonstrates that TVA's argument lacks merit. TVA has already litigated numerous cases under the ERA where monetary damages were awarded or agreed to, without once having raised the immunity argument now presented. *See, e.g., Jocher v. TVA*, Case No. 94-ERA-24 (ALJ July 31, 1996); *Klock v. TVA*, Case No. 95-ERA-20 (ALJ Sept. 29, 1995).

Overall's arguments have merit. *Pastor* based its holding on its interpretation of statutory construction, focusing solely on the term "person" to bar suit against federal agencies pursuant to § 5851. Such an interpretation, however, is counterintuitive and in conflict with federal case law.

As *Pastor* held, the term "person" in § 5851 is ambiguous, and the Board correctly attempted to ascertain the meaning of "person" through statutory construction. "Statutory

interpretation is a holistic endeavor," however, and a provision "that may seem ambiguous in isolation is often clarified by" the greater consistency of one interpretation with "the rest of the law." *United Savings Ass'n of Texas v. Timbers of Inwood Forest Assoc.*, 484 U.S. 365, 371 (1988). "When interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute … and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the legislature." *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974); *see also, Conroy v. Aniskoff*, 113 S. Ct. 1562 (1993); *King v. St. Vincent's Hospital*, 112 S. Ct. 570 (1991).

The ERA's statutory purpose is to ensure clear lines of communication between employees and regulatory agencies. *CL&P v. Secretary of Department of Labor*, No. 95-4094 (2nd Cir. 1996). Section 5851 is a remedial amendment intended to further open those lines of communication. "[I]t is appropriate to give a broad construction to remedial statutes such as nondiscrimination provisions in federal labor laws." *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1512 (10th Cir. 1985); *see also, DeFord v. Secretary of Labor*, 700 F.2d 281, 286 (6th Cir. 1983) ("the need for broad construction of the statutory purpose can well be characterized as necessary to prevent the [NRC's] channels of information from being dried up by employer intimidation"); and, *In re Five Star Prod., Inc.*, 38 N.R.C. 169, 179, 1993 WL 461372, *7 (NRC Oct. 21, 1993) ("Any attempt to 'chill' this access to the NRC by harassing, intimidating, or firing employees who could report conditions that could adversely affect the public health and safety violates Section 211.").

To enact a whistleblowing provision to ensure open lines of communication between employees of nuclear facilities (who would know firsthand of potential safety problems and violations) and the NRC, and then to exclude those protections from employees of federal nuclear employees, such as those at TVA, does not serve the open communication purpose of the ERA nor does it comply with the remedial construction demanded of federal non-discrimination provisions.

An obvious corollary to this rule is that one provision of a statute should not be interpreted in such a way as to negate or perhaps even derogate from other provisions of the statute. Section 206 of ERA, 42 U.S.C. § 5846 requires that persons having notice of statutory violations or safety defects <u>*shall*</u> immediately notify the NRC. *Norman v. Niagara Mohawk Power Corporation*, 873 F.2d 634, 635 (2nd Cir. 1989) (emphasis added).

Section 210 of the ERA provides a remedy for an employee who has been discriminated against or discharged for making such a safety complaint. To interpret the protections and remedies of § 5851 as excluding all federal agencies puts the federal nuclear employee in an impossible situation. On the one hand, the employee is required by § 5846 to report safety problems to the NRC, while at the same time, *Pastor's* interpretation of § 5851 precludes him from any protections and remedies for his required reporting. Such an interpretation conflicts with the purpose of the ERA and serves to derogate the reporting requirements of § 5846.

Further, there is a presumption that Congress will not withdraw all remedies or judicial avenues of relief when it recognizes a statutory right. *See South Carolina v. Regan*, 465 U.S. 367 (1984). Under § 210, an aggrieved employee may file a complaint with the Secretary of Labor within 30 days after a violation. *Norman v. Niagara Mohawk Power Corporation,* 873 F.2d 634, 637 (2nd Cir. 1989). The administrative remedies provided in § 210 are exclusive. *See, e.g., Willy v. Coastal Corp.*, 855 F.2d 1160, 1169 (5th Cir. 1988) ("[T]he whistleblower provisions expressly limit the remedy to an administrative claim with the Secretary"); *Kansas Gas and Electric Co. v. Brock*, 780 F.2d 1505, 1508 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011, 106 S. Ct. 3311, 92 L.Ed. 2d 724 (1986) ("[S]ection 5851 of the ERA states that exclusive jurisdiction in employment discrimination matters is vested by Congress in the Secretary of Labor."); and, *Norris v. Lumbermen's Mutual Casualty Co.*, 687 F. Supp. 699, 703 (D. Mass. 1988) ("[T]he statute provides an exclusive federal remedy for employee protection in this field.").

Congress enacted the whistleblower provisions of § 5851 to protect employees who report safety violations to the NRC. Through statutory construction and subsequent interpretation through case law, those remedies are to be considered exclusive. *Pastor*'s interpretation of § 5851 closes off all avenues of relief for employees of federal agencies such as TVA, thereby conflicting with the Congressional presumption against closing off all avenues of judicial relief.

The Sixth Circuit follows this line of reasoning, holding that the protections and remedies of the ERA are available to federal employees and specifically holding that § 5851 is applicable to TVA. *Jones v. TVA*, 948 F.2d 258, 262, 264 (6th Cir. 1991) ("because TVA is an agency of the federal government, … [the plaintiff] was a federal employee during his tenure with TVA. … [Such a federal employee] who is retaliated against for filing reports concerning violations of nuclear regulatory laws has recourse under the ERA.").

TVA is a federal "employer" covered under the ERA. Section 5851 provides an exclusive remedy, including the possibility of monetary damages, to employees who are harassed or retaliated against for engaging in protected whistleblowing activities under the Act. After review of the arguments and law discussed above, I find that TVA expressly waived its sovereign immunity through the "sue and be sued" clause contained in its enabling statute and that TVA has expressly consented to be sued for monetary damages pursuant to § 5851. TVA's Motion to Dismiss is denied.

II. ISSUE

1. Whether TVA engaged in retaliatory harassment and discrimination against Overall by failing to prevent a hostile work environment, by failing to prevent harassment outside of the work place, and by failing to conduct an adequate investigation of the incidents of alleged harassment which occurred following Overall's return to work on February 19, 1999.

III. FINDINGS OF FACT

A. Background

1. The Complainant, Curtis C. Overall, lives in Cleveland, Tennessee, with his wife, Janice; daughter, Amanda; and, two sons, David and Joseph (Overall, TN Tr. at 72).

2. Overall has an Associate Degree in Engineering and Technology from Cleveland State Community College in Cleveland, Tennessee (Overall, TN Tr. at 74-75).

3. Overall's wife, Janice Overall, runs a "Mary Kay" cosmetics business from the Overall residence (Overall, TN Tr. at 808).

4. In order to facilitate Janice Overall's home business, the Overalls have a listed telephone number (Overall, TN Tr. at 808).

5. Overall's residence in Cleveland, Tennessee is approximately 35-40 miles from TVA's Watts Bar facility (Janice Overall, TN Tr. at 964-967; Holloway, TN Tr. at 1573-1574).

6. Respondent TVA is an agency of the United States Government (CX 470 at 25). It holds several nuclear plant licenses from the Nuclear Regulatory Commission ("NRC"),

including licenses for Watts Bar, located near Spring City, Tennessee (*Id.*).

7. TVA employs between 12,000 and 13,000 employees (Purcell, TN Tr. at 1095).

8. TVA's Watts Bar Nuclear Facility employs approximately 700 employees (Purcell, TN Tr. at 1095).

9. Watts Bar is an ice condenser plant, as are eight other nuclear plants in the United States, *i.e.*, Sequoyah Units 1 & 2 (TVA); Catawba Units 1 & 2 and McGuire Units 1 & 2 (Duke Energy); and, D.C. Cook Units 1 & 2 (American Electric Power). (Lochbaum, DC Tr. at 37; CX 250).

10. The ice condenser system, designed by Westinghouse, is a critical safety system designed to absorb excess steam in the event of a pipe leak or break within the reactor containment area, thereby preventing the release of radioactivity into the atmosphere (Overall, TN Tr. at 90-92).

11. At Watts Bar, the ice condenser has 24 bays, each containing 81 cylindrical ice baskets that are 48 feet long and 1 foot in diameter, for a total of 1944 baskets (Overall, TN Tr. at 89; CX 250). During plant operation, the baskets are filled with nearly three million pounds of treated ice (CX 250). Each basket is held together with a total of 100 ice basket screws, with a specified number of screws installed at each six-foot elevation (CX 5).

12. Overall was hired by TVA in February 1979 as an Engineering Aide in the Turbine Fossil Division (Overall, TN Tr. at 73, 75).

13. After about a year-and-a-half, Overall transferred to TVA's nuclear division, working as an Engineering Aide in the Stationary Equipment Group at TVA's Chattanooga corporate office (Overall, TN Tr. at 76).

14. In 1980 or 1981, Overall transferred to TVA's Sequoia Nuclear Plant, where he was employed as an Engineering Aide, working in the Mechanical Maintenance Division, on ice condenser-related materials (Overall, TN Tr. at 76-77).

15. In December 1984, Overall was hired as an SE-5, Engineering Associate, at TVA's Watts Bar Nuclear Facility (Overall, TN Tr. at 77; CX 17 at 4-5).

16. In 1989, Overall transferred as a Power Maintenance Specialist for the ice condenser system at Watts Bar (Overall, TN Tr. at 80-81). In that capacity, Overall had daily contacts with operations, planning, and the maintenance group, and Overall wrote start-up and test instructions for preparing the plant system for use. (*Id.* at 80; CX 465).

17. A Problem Evaluation Report ("PER") is a report which is prepared when a problem is found. The purpose of a PER is to describe a problem, determine its safety significance, resolve the problem through corrective action, and document when and how the problem is solved (Overall, TN Tr. at 84-85).

18. In 1994, Overall was employed as a Power Plant Specialist in the Nuclear Steam Supply System Engineering ("NSSS") section of the Watts Bar Technical Support organization, where he was responsible primarily for the ice condenser system. His job duties included maintenance, operation, construction and design of the ice condenser system with additional duties as project manager on capital projects and backup systems engineer on other plant systems, in the absence of the engineer primarily assigned to these systems. [*See* Judge Kennington's Recommended Decision and Order (RDO) at 23-24; *Overall v. Tennessee Valley Authority,* ARB Nos. 98-111, 98-128, ALJ No. 1997-ERA-53 (ARB Apr. 30, 2001)].

19. Overall was also responsible for maintaining contacts and sharing information with his counterparts, *i.e.*, the ice condenser systems engineers at other nuclear power plants, through the Ice Condenser Utility Group, an owner's group which Overall helped start (Overall, TN Tr. at 82-83). Overall spent 80-90 percent of his time working on the ice condenser system (*Id.*).

20. As Watts Bar moved from construction to an operating plant, a reorganization was announced in 1994, during which Overall received a notification that he was an "at risk" employee, indicating that his position might be eliminated in 1995 (Overall, TN Tr. at 430-431).

21. In April 1995, Watts Bar prepared for its start up (Overall, TN Tr. at 94). Part of that process included the melting out and reloading of the treated ice in the ice condenser system (*Id.* at 86-87).

22. An inspection was performed on April 12, 1995, after the melting out during which Overall discovered 171 ice basket screw heads and 32 complete ice basket screws in an ice melt tank. This meant that the screws and screw heads had been

flushed from the floor of the building through the tank and had been retained in a sieve or trap. (CX 1; RDO at 23-24). Overall reported the condition to his first-line supervisor, Landy McCormick ("McCormick") and, at McCormick's direction, issued Problem Evaluation Report 9500246 (PER 246) (*Id.*). A "PER" operates as an internal tracking document affording verification that a particular problem has been resolved (*Id.*). The Nuclear Regulatory Commission ("NRC") routinely examines PERs during audits of power plants (*Id.*).

23. In the Corrective Action Plan of PER 246, Overall proposed: 1) a video camera inspection of a large sample (nearly 400) of ice baskets to determine the condition and number of screws; 2) that TVA perform metallurgical tests on the whole and broken screws to determine the mode of failure of the screws; and, 3) that Westinghouse evaluate the results of the camera inspection and metallurgical tests (Overall, TN Tr. at 101; CX 1; CX 432).

24. Overall knew from experience that it would take several weeks to do the video camera inspection, and that if problems were found with the baskets, then a further inspection, leading to replacement of the screws and even melting out and reloading the ice anew, would delay fuel loading at Watts Bar for another six months to a year (Overall, TN Tr. at 95-96).

25. TVA did not incorporate the video camera inspection into its final corrective action plan (Overall, TN Tr. at 115-117; Adair, TN Tr. at 2158; Pace, TN Tr. at 2481-2482; CX 5).

26. Overall provided new, whole, and unbroken screws to TVA's Central Labs for metallurgical testing (Overall, TN Tr. at 101-102). The first lab report, dated June 2, 1995, set forth the possible modes of failure, including intergranular separation caused by stress overload (*Id.* at 102-107). The lab also found that some of the new screws had quench cracks caused by manufacturing defects (*Id.* at 102, 105; CX 4). Overall provided this first lab report to his supervisors and to Westinghouse (*Id.* at 109).

27. On June 14, 1995, Watts Bar management convened a meeting to discuss the first lab report (Overall, TN Tr. at 109-110; CX 7). PER 246 was transferred from Overall's department to James Adair ("Adair"), the lead Civil Engineer in Nuclear Engineering (*Id.* at 119-120; CX 7).

28. On June 13 and 14, 1995, immediately before and after this meeting, Overall allegedly received harassing phone calls making reference to the fact that he had raised safety

issues (Overall, TN Tr. at 111-112, 117-118). He reported these calls to his supervisors (*Id.*). On June 16, 1995, Dennis Koehl ("Koehl"), Overall's second-line supervisor, told Overall that his job at Watts Bar was being eliminated and that he would be transferred to a temporary position at TVA Services (*Id.* at 120-121; CX 464). Later that day, Overall allegedly received a third harassing phone call in which the caller stated, "[w]e're glad you're leaving Watts Bar" (*Id.* at 124).

29. On June 19, 1995, TVA's Central Laboratories issued the second lab report for PER 246 (Overall, TN Tr. at 125-126; CX 8; CX 481).

30. On July 28, 1995, Adair, the lead Civil Engineer at Watts Bar, closed out PER 246 (Overall, TN Tr. at 126; Adair TN Tr. at 2165).

31. Gary Jordan, ("Jordan"), a four-year degreed engineer, applied for and received the systems engineer job at the Watts Bar ice condenser system (Jordan, TN Tr. at 2660-2661; Overall, TN Tr. at 592-593). Overall assisted in Jordan's transfer by walking the system down with him (*Id.* at 2600), by showing Jordan modifications and changes implemented over the past years (*Id.* at 2660-2662), by introducing Jordan to other employees within the system and to the Westinghouse representative (*Id.*), by reviewing information in the filing cabinets (*Id.*), and by reviewing reference manuals and vendor books (*Id.*).

32. Overall transferred to TVA Services in early November 1995, where he unsuccessfully attempted to find another position within TVA (Overall, TN Tr. at 127-128).

33. On July 24, 1996, Overall received a Notice of Layoff from Services, and he was laid off effective September 30, 1996 (*Id.*).

B. Overall's Protected Activities[4]

i. Overall's First DOL Complaint and Subsequent Events

34. On January 15, 1997, Overall filed a complaint with the Department of Labor, alleging that TVA engaged in a

[4] TVA concedes that Overall engaged in protected activity by filing his 1997 complaint, by speaking at the 1998 press conference, and by speaking with the NRC inspectors during the September 1998 inspection at Watts Bar (Respondent's Post-Hearing Brief, p. 130, fn. 43).

discriminatory reduction in force due to Overall's initiation of PER 246 (Overall, TN Tr. at 73, 128; CX 17).

35. Overall was assisted in his whistleblower claim by Ann Harris ("Harris"), another TVA whistleblower, and Dave Lochbaum ("Lochbaum"), a Safety Engineer with the Union of Concerned Scientists (Lochbaum, DC Tr. at 40-42; Overall, TN Tr. at 137).

36. In February 1997, Overall met with the NRC OIG and with Lochbaum[5] to report his safety concerns with the ice condenser system at Watts Bar and other ice condenser plants (Overall, TN Tr. at 136-138). Safety concerns are issues that "actually, or have the potential for, affecting nuclear safety at a nuclear power plant" (Lochbaum, DC Tr. at 13). During this meeting and through his subsequent correspondence with the NRC OIG, Overall reported his concerns that TVA did not properly close out PER 246 and that missing or broken ice basket screws had been discovered at the D.C. Cook plant, indicating the generic safety significance of PER 246 (Lochbaum, DC Tr. at 38, 40-42; Overall, TN Tr. at 139-142; Harris, TN Tr. at 1017-1019; CX 24).

37. During the February, 1997, meeting with the NRC OIG, Overall also reported his concerns that foreign debris was present in the ice condenser system at Watts Bar and other plants, that a steam leak inside the containment at Watts Bar was causing significant ice buildup requiring workers to frequently enter the system to chip excess ice off the ice condenser system doors, that this ice buildup was causing failure of the gaskets around the doors and that warehouse (new) screws as well as installed screws were cracked (Lochbaum, DC Tr. at 39-40, 68-70).

38. NRC's Region III, in Chicago, Illinois, which has jurisdiction over the D.C. Cook plant, had a conference call in January 1998 with Overall and Lochbaum (Lochbaum, DC Tr. at 42-43). In that call, Overall detailed his safety concerns about the ice condenser system at Watts Bar and the consequences for other Westinghouse plants (*Id.*). In the Spring of 1998, NRC Region III inspected D.C. Cook, identified 29 safety violations, and imposed a $500,000 fine on the owners of D.C. Cook (*Id.* at 43-45). The required repairs delayed the start up of that plant for an additional two years (*Id.*; CX 250). Similarly, Overall's reports led to a shutdown at the Catawba plant in August 1998

[5] This tribunal recognized Mr. Lochbaum "as an expert in analyzing safety concerns for nuclear plants" (DC Tr. at 27-28).

and to the NRC issuing a notice of violation to Westinghouse (Lochbaum, DC Tr. at 46-47; CX 250).

39. During the 1997-1998 time frame, Harris and Overall were the only current or former TVA employees who were known as whistleblowers with respect to the ice condenser system at Watts Bar (Lochbaum, DC Tr. at 114-115).

40. While the DOL was conducting a March, 1997, onsite investigation at Watts Bar, Overall allegedly received a harassing phone call in which the caller stated, "Mr. Overall, you've got to keep your damned mouth shut" (Overall, TN Tr. at 129).

41. On June 13, 1997, the Assistant District Director of the Wage and Hour Division, after completing an investigation, determined that TVA had discriminated against Overall when it terminated his employment; TVA appealed this decision to the Office of Administrative Law Judges (CX 17).

42. On April 1, 1998, Administrative Law Judge Clement J. Kennington issued a Recommended Decision and Order Awarding Benefits, in which he found that TVA intentionally discriminated and retaliated against Overall, because he engaged in a protected activity, in that he reported safety problems with the ice condenser system at Watts Bar (Overall, TN Tr. at 73-74, 130; CX 17).

43. In addition to awarding Overall compensatory damages, attorneys fees, costs, and back pay, Judge Kennington ordered that TVA reinstate Overall to his former position of Power Plant Maintenance Specialist (SD-4) at Watts Bar or, if that position was no longer available, to a substantially equivalent position (Overall, TN Tr. at 74; CX 17, 36).

44. Judge Kennington's Recommended Decision and Order was affirmed by the Administrative Review Board (*Overall v. Tennessee Valley Authority,* ARB No. 98-111, 98-128, ALJ No. 1997-ERA-53 (ARB Apr. 30, 2001)) and by the Sixth Circuit Court of Appeals (*Tennessee Valley Authority v. United States Dept. of Labor,* No. 01-3724 (Mar. 6, 2003)).

45. On April 16, 1998, in response to Judge Kennington's Recommended Decision and Order, TVA issued a site bulletin titled, "Bulletin from Watts Bar Nuclear Plant." The purpose of this bulletin was to reinforce TVA's zero-tolerance policy on intimidation and harassment, and to encourage individuals to identify and raise concerns (Purcell, TN Tr. at 1100; RX 19).

46. On May 2, 1998, the *Knoxville News-Sentinel* published an article entitled "TVA Whistleblower Wins Back His Job," which discussed Judge Kennington's decision in favor of Overall (Overall, TN Tr. at 134; CX 26).

ii. Overall's Protected Activity at the May 26, 1998 Press Conference

47. Prior to his return to work at Watts Bar, Overall accepted an invitation from Harris to speak at a press conference scheduled for May 26, 1998 at the National Press Club in Washington, D.C. about his safety reports and his case against TVA (Overall, TN Tr. at 147-48). The purpose of the conference was to protest a proposal to manufacture tritium for the Department of Defense at TVA reactors and to protest TVA's consideration of a plan to finish construction of the Bellefonte Nuclear Plant in Alabama (Overall, TN Tr. at 151; CX 41).

48. On May 23, 1998, *The Atlanta Constitution* published an article discussing Overall's whistleblowing activities, and announcing that Overall would be speaking at a press conference at the National Press Club in Washington, D.C. on May 26, 1998 (Overall, TN Tr. at 147-48; CX 33).

49. On May 26, 1998, Overall spoke at the Washington, D.C. press conference, where he read a one-page prepared statement of his work experiences at Watts Bar up to the date of the press conference (Overall, TN Tr. at 155; CX 40). The prepared statement chronicled his employment with TVA, his discovery of screws in the ice condenser baskets, his reporting of that safety issue to Watts Bar management, and his encountering of alleged harassing activity subsequent to raising his safety concerns (CX 40).

50. On May 27, 1998, *The Knoxville News-Sentinel* published an article titled "Nader Opposes TVA's Tritium Plan," which discussed the May 26, 1998 Washington, D.C. press conference. The article also discussed Overall and his case against TVA (Overall, TN Tr. at 157-58; CX 41).

51. On May 28, 1998, the Washington, D.C. press conference, featuring Overall, was nationally televised on C-SPAN (Overall, TN Tr. at 155, 159; CX 36).

iii. Overall's First Meeting With NRC Inspectors

52. The NRC conducted a planned inspection of the ice condenser system at Watts Bar from Monday, August 31, 1998 through Friday, September 4, 1998 (Overall, TN Tr. at 272).

53. On September 1, 1998 and September 2, 1998, Overall, Jordan, and Smith joined two NRC inspectors in a walk-through of the ice condenser system (Overall, TN Tr. at 273).

54. On September 2, 1998, at the end of the ice condenser walk-through, NRC inspector Nicholas Economis, ("Economis") requested to speak with Overall in private (Overall, TN Tr. at 275). Overall spoke privately with Economis and another inspector, Bill Beardon, ("Beardon") for 15 to 20 minutes (Overall, TN Tr. at 276). Overall told the inspectors that while the ice condenser appeared to be in good condition for their inspection, it was a "mess" the week before as "we had ice everywhere, chipping ice off the floors" (Overall, TN Tr. at 276).

55. Following his meeting with the inspectors, Overall met with Smith, Jordan, and back-up engineer Law to discuss the NRC inspection (Overall, TN Tr. at 277). Smith asked Overall what he had discussed in his private meeting with the inspectors. Overall told Smith that he could only discuss portions of the conversation he had with the inspectors. Wiggall entered the meeting, and during a discussion about the inspection he asked Overall what had been discussed with the inspectors at his private meeting. Overall said he could only discuss a portion of his discussion with the inspectors, and he told Wiggall the technical items that were discussed, such as the blanket and the condition of the ice condensers (Overall, TN Tr. at 279; Smith, TN Tr. at 2785; Wiggall, TN Tr. at 1836-37; Jordan, TN Tr. at 2640).

iv. Overall's Second Meeting With NRC Inspectors

56. On September 3, 1998, Overall delivered his written comments regarding the NRC inspection, his manager's comments, and "what [Overall] noticed as a result of the post-inspection" to the NRC investigators at the conference room where they were working at Watts Bar (Overall, TN Tr. at 283-84; CX 99). While in the conference room, Overall met with Paul Frederickson, ("Frederickson"), a Manager of NRC Region 2, Beardon, and Economis to discuss his concerns regarding the NRC investigation (Overall, TN Tr. at 284-85). Near the end of Overall's meeting with Frederickson, Beardon, and Economis, Adair entered the meeting room unannounced and stood in the room, which Overall took as an indication that he should end the meeting (Overall, TN Tr. at 285).

57. On September 4, 1998, Overall attended the NRC's exit meeting following their inspection to inform the plant

managers what was found during the inspection. At the exit meeting, NRC inspectors stated that there were open issues that needed to be resolved regarding storage of the screws for the ice condenser (Overall, TN Tr. at 291-2).

v. Overall's Second DOL Complaint

58. On February 19, 1999, Overall filed the instant complaint with the Department of Labor, based upon alleged retaliatory harassment and discrimination (Overall, TN Tr. at 342-43; CX 158).

vi. Overall's Third DOL Complaint

59. In October, 1999, C.L. Kelly, chairman of the screening review board for TVA, authored and sent a letter to Overall stating that Overall's security access to sensitive portions of TVA Watts Bar had been denied, based upon psychological characteristics that could adversely impact emotional stability, and behavior and reliability in the work place. (Overall, TN Tr. at 346). In response to the October 12, 1999 denial of his unescorted security clearance, Overall appealed the decision of the TVA Screening Review Board and filed a third complaint with the Department of Labor (Overall, TN Tr. at 348).

60. Overall received a letter from Mr. Casey of Personnel Security, dated December 6, 1999, notifying Overall that his appeal was to be placed on hold pending a TVA psychologist's reevaluation and that Overall's security clearance was being reinstated (Overall, TN Tr. at 349; CX 207).

61. Following reinstatement of his security clearance, Overall withdrew his third Department of Labor complaint (Overall, TN Tr. at 350).

C. TVA Prepares to Return Overall to Work at Watts Bar in Compliance with Administrative Law Judge Kennington's Recommended Decision and Order

62. During May and June 1998, counsel for Overall and counsel for TVA attempted to negotiate a settlement of all claims against TVA (Overall, TN Tr. at 166-167). These negotiations were unsuccessful, and counsel for both parties arranged for Overall's return to work at Watts Bar (*Id.* at 200-201).

63. John Scalice, TVA's Chief Nuclear Officer and Executive Vice-President for TVA Nuclear, informed Watts Bar

Human Resources and Richard Purcell ("Purcell"), who was then the Watts Bar Site Vice-President, that "Curtis [Overall] would be coming back, and we were to find a position for him. Tell everybody that … he is back and that it's got to be behind us, to go forward, and he's part of the team." (Scalice, TN Tr. at 857-858). At the meeting, Scalice emphasized that Overall was not to be subjected to any form of retaliation, intimidation, harassment, or unfriendly behavior (Scalice, TN Tr. at 858).

64. In response to Judge Kennington's April 1, 1998 Decision, Purcell met with Human Resources employees to discuss how to comply with the Overall Decision and he issued an April 16, 1998 memorandum "reiterat[ing] the … policy that intimidation, harassment, discrimination, or retaliation for expressing concerns will not be tolerated" (Purcell, TN Tr. at 1099; RX 19). He also "re-emphasize[d] the importance of continuing to communicate openly, freely, and accurately without fear of retaliation" (*Id.*).

65. In 1998, the primary responsibility for providing system support for the ice condenser was assigned to the Nuclear Steam Supply System ("NSSS") section. Gary Jordan, the system engineer, was responsible for the ice condenser and for the ice boration system (Jordan, TN Tr. at 2599; Wiggall, TN Tr. at 1862). Wiggall, Higginbotham, and Engineering Manager Jim Maddox met and agreed that Overall should be assigned to NSSS in order to provide him with comparable work to his previous position (Higginbotham, TN Tr. at 1261-1262, 1267, 1271; Wiggall, TN Tr. at 1860).

66. In April 1998, subsequent to Judge Kennington's April 1, 1998 Decision, Richter Wiggall, ("Wiggall"), NSSS Engineering Supervisor, held a meeting with the entire Systems Engineering group, where he explained that Overall would be working in the group (Wiggall, TN Tr. at 1826-27). Wiggall instructed the Systems Engineering group to be "extremely sensitive … to help [Overall] back into the work force, and … to be careful that we don't say things that would be mistaken or inappropriate in [Overall's] mind" (Wiggall, TN Tr. at 1826-27).

67. Higginbotham and other TVA managers prepared a "Plan for Returning Overall to WBN," consisting of a memorandum detailing important concerns and issues involving Overall's return to work at Watts Bar (CX 25; RX 21; Higginbotham, TN Tr. at 1260-61).

68. In preparation for Overall's return, Higginbotham spoke with James Adair ("Adair"), Tim McCollum, ("McCollum"), and McCormick, (three of the employees held by Judge Kennington

to have participated in an organized scheme to remove Overall from Watts Bar; *see* RDO at 29; CX 17 at CCO 00029) and told them to "treat [Overall] with respect" and to "realize that he may be sensitive to things" (Higginbotham, TN Tr. at 1323). TVA informed its managers that TVA disagreed with the RDO and that it continued to support the managers specifically named in the RDO (Higginbotham, TN Tr. at 1268-1270, 1322; CX 42; RX 20).

69. By letter dated May 20, 1998, Randy Higginbotham, ("Higginbotham"), a Watts Bar Human Resources Consultant, informed Overall that he would be "reinstated to your former position of Power Maintenance Specialist, SD-4 … involving the ice condenser system at the Watts Bar Nuclear Plant." He instructed Overall to report to TVA Medical on May 26, 1998 or May 27, 1998 for mandatory alcohol and drug testing and to report to the Human Resources Office at Watts Bar on June 1, 1998 to begin work (Higginbotham, TN Tr. at 1271, 1310; RX 22; CX 30). Included with the letter was the job description of the position that Overall held prior to his termination from Watts Bar (Overall, TN Tr. at 144; CX 465).

70. Scalice issued a May 28, 1998, memorandum titled "Manager Talking Points - Overall," which stated that "TVA has petitioned a review of the decision to the Administrative Review Board," but that "based upon the recommended decision, TVA must reinstate Mr. Overall to his former position at WBN." The memo also stated that "it is a requirement of law that [Overall] not be retaliated against for filing his complaint," and that Overall must be treated "with the same respect, dignity, and recognition we give every other employee" (Scalice, TN Tr. at 861-62; CX 42). The memorandum directed managers to raise the points discussed therein with their workforces and to report back to Scalice during the next monthly meeting on the actions taken to carry out this directive (RX 42). At the next monthly meeting on July 8, 1998, Scalice "stressed the importance of reinforcing TVA's policy against intimidation and harassment in the workplace. Each vice president discussed steps taken and steps planned with their respective organization to ensure a safety-conscious work environment" (RX 46).

D. Overall's Return to Work at Watts Bar

71. On July 22, 1998, Purcell conducted a meeting with his direct subordinates where he reinforced TVA's "zero tolerance for intimidation or harassment" (Purcell, TN Tr. at 1102-03; RX 46).

72. Overall returned to work at Watts Bar on August 5, 1998 (Overall, TN Tr. at 497).

73. At the time of his reinstatement, Overall's first-level supervisor was Phillip Smith ("Smith"), a NSSS Manager in Systems Engineering, and his second-level supervisor was Wiggall (Overall, TN Tr. at 209; Higginbotham, TN Tr. at 1309; Smith, TN Tr. at 2748-49; Wiggall, TN Tr. at 1810-11; CX 467). Smith told Overall that he was "to work with Gary Jordan and get up to speed" on the ice condenser system and that "the ice condenser was a mess" with steam leaks causing ice buildup and frequent entries into the system to remove ice from the doors to keep them operable (Overall, TN Tr. at 205-206).

74. Overall finished General Employment Training on August 6, 1998 and Nuclear RAD worker training on August 12, 1998 (Overall, TN Tr. at 498). He first entered the protected area of Watts Bar on August 12, 1998 at 12:58 p.m. (Overall, TN Tr. at 2758). Because Overall did not yet have security clearance, he had to enter the "protected area" inside the plant with an escort (Overall, TN Tr. at 498-99).

75. During his reinstatement at Watts Bar, Overall was not given the opportunity to work overtime (Overall, TN Tr. at 367). During this time, Jordan and Smith were away from Watts Bar for different periods of time. Jordan and Overall were onsite together for only three days (Jordan, TN Tr. at 2736; Smith, TN Tr. at 2758, 2762; RX 194).

76. TVA procedures require that employees obtain a qualification card before being permitted to perform unsupervised work on a PER (Overall, TN Tr. at 2957-2958, 2995; Smith, TN Tr. at 2756). A qualification card is earned by familiarizing oneself with all the procedures necessary to complete a given task and by taking a practical factors examination (Smith, TN Tr. at 2755-2756). Given that Overall had been gone from Watts Bar for nearly three years, he lacked a current qualification card. Smith, therefore, could not assign Overall any unsupervised tasks on open PERs until Overall completed his updated training (Smith, TN Tr. at 2754-2755). Smith told Overall during their first meeting in Higginbotham's office that "there is going to be some training that he had to go through to get up to speed on procedure changes and be able to do the work. And that is normal for any employee coming in." (Smith, TN Tr. at 2755-2756). During the 12 days Overall was onsite, he did not complete the training necessary to obtain a current qualification card (Smith, TN Tr. at 2855-2856).

77. During August and September 1998, there were several open PERs related to the ice condenser system at Watts Bar (Overall, TN Tr. at 224; CX 436-441; CX 443-449). Overall was

not assigned any work on these open PERs (TN Tr. at 228, 236, 239, 241, 242, 243). Most of the Corrective Action Plans regarding these open PERs had already been prepared by the time Overall entered the protected area at Watts Bar or such plans were not generated until after Overall left Watts Bar in September 1998 (Jordan, TN Tr. at 2723-2724; CX 434 at 12473; CX 435 at 12489; CX 436 at 12534; CX 437 at 12563; CX 438 at 12689; CX 440 at 12893; CX 441 at 12669; CX 442 at 128561; CX 444 at 12897; CX 445 at 12812; CX 446 at 12915; CX 448 at 12980; CX 449 at 12918). By the time Overall had returned to NSSS, responsibility for implementation of the Corrective Action Plans on most open PERs had been previously assigned to other employees in NSSS or to groups outside of NSSS (Jordan, TN Tr. at 2723-2724).

78. During August and September 1998, Overall was asked to write several purchase requisitions and he accompanied Jordan into the ice condenser system to take several readings (Overall, TN Tr. at 214).

79. Overall's return to employment at Watts Bar lasted approximately 30 days, from August 5, 1998 until September 4, 1998, when Overall was hospitalized after the September 9, 1998 fake bomb incident (Overall, TN Tr. at 561; Higginbotham, TN Tr. at 1340-1343; Smith, TN Tr. at 2758-2762; RX 194; FoF ¶ 112-126). During this time, Overall took administrative or annual leave, or was otherwise not working in his department on at least eight occasions (Smith, TN Tr. at 2757-2762). Overall was actually at work during this 30-day period approximately 12 days (Higginbotham, TN Tr. at 1340-1343; Smith, TN Tr. at 2762; RX 194).

E. Offsite Anonymous Incidents of Harassment

i. The May 25, 1998 Telephone Call[6]

80. On the evening of May 25, 1998, Overall received a phone call which he described as a caller repeatedly blowing a whistle (Overall, TN Tr. at 150). Overall's caller-ID system recorded this as a local call from telephone number 472-9374 (CX 14 at 00081; CX 276 at 004521). Overall testified that he interpreted the telephone call as a "kind of warning" that "put me on alert" about participating in the Washington D.C. press conference (*See* FoF ¶ 47-49) (Overall, TN Tr. at 150).

[6] The paragraph headings and event titles of the alleged incidents of harassment are taken from the headings used by both the Complainant and the Respondent in their post-hearing briefs.

81. Overall reported the telephone call to his attorney and to the Federal Bureau of Investigations ("FBI") (Overall, TN Tr. at 150-51). Overall's counsel reported the incident to TVA's Office of General Counsel on May 28, 1998 (Overall, TN Tr. at 150; CX 256).

82. Agent Holloway testified that as part of her subsequent investigation, she subpoenaed the telephone records for the telephone number of the May 25, 1998 call (Holloway, TN Tr. 1485). The subpoenaed records showed that a call was made from a local Cleveland, Tennessee payphone to Overall's home telephone number on the date and time that he reported receiving a harassing call (*Id.* at 1485, 1681-1682; CX 276). Holloway subpoenaed telephone records of the numbers to which calls were made from this payphone before and after the May 25, 1998 call to Overall's residence in an effort to identify the Overall caller (*Id.* at 1683). The subpoena revealed that three calls were made to the Stancil, Cronin, and Mooney residences near the time of the Overall call (*Id.* at 1487-1488). Holloway did not contact those residences because they had no recognizable reference to TVA employees (*Id.* at 1488-1489). These calls were sufficiently separated in time from the call made to Overall that Holloway felt that they were not likely to have been placed by the same person that called Overall (Holloway, TN Tr. at 1485-1488; CX 345).

83. Overall does not know who placed this call and he has no information linking the call to TVA (Overall, TN Tr. at 464).

ii. The May 28, 1998 Incident Involving the "Gray Car"

84. On May 28, 1998, Janice Overall (Overall's wife) observed a "gray BMW or Mercedes driving through [the Overall] neighborhood very slowly" (Janice Overall, TN Tr. at 901). She noticed the car because it was "something that we weren't used to seeing in our neighborhood" and because the man driving the car drove by the Overall home slowly and stared "straight at [Janice Overall] with a dead, cold stare" (Janice Overall, TN Tr. at 901).

85. The license plate number for the car was not obtained by the Overalls (Janice Overall, TN Tr. at 957); Overall, TN Tr. at 441-442). Neither Mr. nor Mrs. Overall was able to identify either the vehicle or the driver as being affiliated with TVA (*Id.*).

iii. The May 29, 1998 Suspicious Car

86. On May 29, 1998, at approximately two o'clock in the morning, Overall heard dogs barking outside his home and saw a car without its headlights on rapidly driving away from his home (Overall, TN Tr. at 159-60).

iv. The May 29, 1998 "SILKWOOD" Note

87. On the morning of May 29, 1998, Mrs. Overall discovered a note that read "SILKWOOD" on the windshield of Overall's truck which, at that time, was parked in front of the Overall residence (Overall, TN Tr. at 160; Janice Overall, TN Tr. at 902-03; CX 46). Overall filed a report about this incident with the Cleveland, Tennessee Police Department on May 29, 1998 (Overall, TN Tr. at 161-162; CX 47).

88. Overall thought that the "SILKWOOD" note "could be a death threat," because Karen Silkwood, a well-known whistleblower, was "mysteriously … killed in an accident" (Overall, TN Tr. at 161). Overall testified that he and his wife cried, were very upset, and "very emotional" over the note (*Id.*).

89. On May 29, 1998 Overall's attorney reported the May 25th "whistle-blowing" telephone call and the "SILKWOOD" note to TVA's Office of Inspector General ("OIG"), and he requested that Overall's return date be postponed until June 29, 1998 to allow for a "30-day cooling off period" before Overall returned to Watts Bar (Overall, TN Tr. at 166-67; Higginbotham, TN Tr. at 1360-61; CX 256).

90. On June 2, 1998, the *Chattanooga Free Press* published an article entitled "2 TVA Whistleblowers Receive Death Threats," which discussed the "SILKWOOD" note received by Overall and the harassment of another whistleblower, Ms. Harris (Harris, TN Tr. at 1032; Overall, TN Tr. at 168; CX 50).

v. The June 1, 1998 Gas Cap Incident

91. On the evening of June 1, 1998, Overall's son, Joseph, discovered that the gas tank door on Overall's truck was open and that the gas cap had been removed (Janice Overall, TN Tr. at 904; Joseph Overall, TN Tr. at 672-74; RX 124 at 9).

vi. The June 9, 1998 "BOO" Note

92. On the morning of June 9, 1998, Janice Overall discovered a hand-printed note which read "BOO!" taped to the

front outer storm door of the Overall residence (Janice Overall, TN Tr. at 905-06; Overall, TN Tr. at 173; CX 56). Overall testified that he was "very disturbed … angry … [and he] just couldn't believe everything was just mounting up the way it was doing" (Overall, TN Tr. at 174). He stated that he had "never had any problems … in the past … [and that he] didn't have any disgruntled neighbors … [so] it had to have been from TVA …." (Overall, TN Tr. at 174).

93. Overall reported the "BOO!" note to his attorney and the FBI, and he filed a report with the Cleveland, Tennessee police department (Overall, TN Tr. at 174-75).

vii. The June 11, 1998 "STOP IT NOW" Note

94. On June 11, 1998, upon returning to his truck after shopping at a local Wal-Mart store, Overall discovered a note reading "STOP IT NOW" on the windshield of his truck (Overall, TN Tr. at 178; CX 59). Overall testified that the note made him "real nervous, real shaky," and that he was "frightful of – if the person could be around the truck watching me or something" (Overall, TN Tr. at 179).

95. Overall reported the "STOP IT NOW" note to his attorney, the FBI, and the Cleveland, Tennessee police department (Overall, TN Tr. at 180; CX 60).

viii. June 13, 1998 Popping Noise/Motion Detector Activated

96. On the evening of June 13, 1998, Janice Overall heard a popping noise outside the Overall home (Janice Overall, TN Tr. at 909-10; Overall, TN Tr. at 186). Overall went outside to investigate and noticed that the gas tank door on his truck was open (*Id.)*. Overall saw someone crouching under a tree in his neighbor's front yard, who then ran away (*Id.)*. Overall notified the Cleveland, Tennessee Police Department and the TVA OIG (Overall, TN Tr. at 188). There was no damage to Overall's truck, and nothing was placed in the gas tank (Overall, TN Tr. at 445-446).

97. On June 16, 1998, Overall met with TVA OIG Special Agent Nancy Holloway ("Holloway"), to discuss the alleged ongoing harassment and to give her the originals of the harassing notes received to date (Overall, TN Tr. at 181-82; Holloway, TN Tr. at 1562-63).

ix. The June 16, 1998 Laughing/Breathing Telephone Call

98. On June 16, 1998, Overall's daughter, Amanda, answered a telephone call at the Overall residence, which she described as a lot of perverted laughing and heavy breathing coming from several persons (Amanda Overall, TN Tr. at 1208; Overall, TN Tr. at 189). The caller-ID recorded this call as coming from a local pay phone, with a telephone number of 472-9936 (Overall, TN Tr. at 191; CX 14 at 00085). Overall filed a police report about the incident with the Cleveland, Tennessee Police Department and he informed TVA OIG (Overall, TN Tr. at 190, 192; CX 63).

99. In response to Overall's report, TVA OIG traced the telephone number to a public telephone at a store near the Overall residence (Holloway, TN Tr. at 1492-93, 1581; CX 344, 345, 351). OIG subpoenaed credit card receipts from the store to determine whether any customer of the store that was shopping near the time of the call could be linked to TVA (Holloway, TN Tr. at 1758).

x. The June 17, 1998 'Harassing' Buick Riviera

100. On June 17, 1998, while driving through their neighborhood, Overall and his daughter, Amanda, passed a driver in a Buick Riviera or Regal coming down the opposite side of the street. When Overall and the other driver each motioned for the other to go ahead and pull out, the other driver "gave [Overall] a real good stare and kind of grinned, silly at us" (Overall, TN Tr. at 195). Overall wrote down the license number of the car and reported it to his attorney and left a message for Holloway on the office voice mail, although Holloway did not receive the message (Overall, TN Tr. at 195; Holloway, TN Tr. at 1716-17).

101. After Overall reported the incident to Holloway on June 17, 1998, he received a telephone call from Howard Cutshaw, a personnel officer at Watts Bar who works in the department with Randy Higginbotham and Joe Wallace, requesting the license plate number of the car that Overall reported to OIG. Overall complied with Cutshaw's request and gave him the license plate number (Overall, TN Tr. at 196).

102. Holloway learned of the license plate number in March 2000 when she obtained Overall's journal notes from the OIG office. She subsequently researched the license plate number provided and identified the owner of the car as a Tennessee State Trooper who owns rental property near the Overall's neighborhood. When questioned by Holloway, the

Trooper had no recollection of the incident involving Overall, and he stated that he did not know Overall (Holloway, TN Tr. at 1606-08).

xi. The June 26, 1998 Whistle Telephone Call

103. On June 26, 1998, Amanda Overall answered a telephone call at the Overall residence, which she described as a whistle being repeatedly blown (Amanda Overall, TN Tr. at 1210). Overall wrote down the telephone number that appeared on the caller identification device attached to his phone and reported the call to Holloway, the Cleveland, Tennessee Police Department, the FBI, and his attorney (Overall, TN Tr. at 200; Holloway, TN Tr. at 1590-91).

104. OIG subpoenaed the records for the telephone number provided and traced the call to a public telephone at a convenience store located 3½ miles from the Overall residence (Holloway, TN Tr. at 1590-92; CX 344, 345, 351). OIG subpoenaed the store's video camera tapes, bank records, and credit card receipts for June 26, 1998, the date that the call was made (Holloway, TN Tr. at 1591).

xii. The August 5, 1998 Ninja Motorcycle

105. On the evening of August 5, 1998, as he drove home from work, Overall was followed by someone riding a Ninja motorcycle, who passed him "[a]ggressively, and then went on" (Overall, TN Tr. at 505-06). Overall alleges that the rider tailgated him and made an obscene hand gesture as the motorcycle passed him (Overall, TN Tr. at 504-505; RX 28 at 5806). On August 6, 1998, Overall told Higginbotham that he felt he had been harassed as he drove home from work on August 5, 1998, and described the Ninja motorcycle which had followed him (Overall, TN Tr. at 505). Overall did not provide the license plate number of the motorcycle.

xiii. The August 25, 1998 Blue Pick-Up Truck

106. On the evening of August 25, 1998, on his way home from work, Overall was followed by a light blue pick-up truck flashing its lights and blowing its horn (Overall, TN Tr. at 248-50, 507). The truck repeatedly followed Overall's vehicle extremely close and then backed off. Overall was concerned that the truck was going to attempt to run him off the road (Overall, TN Tr. at 249). When Overall turned off onto his road, the truck continued going straight and blew its horn (Overall, TN Tr. at 250).

107. When he arrived home, Overall left a message with Holloway regarding the incident. Overall did not get the license plate number of the truck, nor did he recall filing a police report concerning the event (Overall, TN Tr. at 508). The next day at work [August 26, 1998], Overall reported the incident to Smith and Higginbotham (Overall, TN Tr. at 250). In his conversation with Smith, Overall also reported his concerns about Adair's hostility regarding Overall's questions about the PER 823 (Overall, TN Tr. at 251; Smith, TN Tr. at 2775) (*See* Adair incident discussion at pp. 87-88). Smith told Overall that he would discuss the incident with Adair (Overall, TN Tr. at 251-52).

108. The blue pick-up truck was not a TVA truck, and Overall could not identify the driver as a TVA employee (Overall, TN Tr. at 507-508).

xiv. The September 2, 1998 Telephone Call

109. On the evening of September 2, 1998, Overall's daughter informed him that she answered a call at the Overall residence in which the caller asked for Overall, refused to identify himself, and then hung up (Overall, TN Tr. at 282). Overall notified his attorney and the TVA OIG office of the call (*Id.*). Overall did not raise this issue as a claim of harassment in his complaint (Overall, TN Tr. at 582-583; RX 124).

xv. The September 6, 1998 Note

110. On Sunday, September 6, 1998, Overall discovered a note under the driver's side windshield wiper of the Overall family car that read "DID YOU GET THE MESSAGE YET?" (Overall, TN Tr. at 294; Janice Overall, TN Tr. at 920-21; CX 103). Overall testified that he felt that the note "was threatening in nature," and "based on the past messages I had received, this was escalating up to a point of – of someone was going to probably do something to me, harm me, kill me or whatever" (Overall, TN Tr. at 295). He reported the note to Higginbotham, Holloway, the Cleveland, Tennessee Police Department, the FBI, and his attorney (Overall, TN Tr. at 295; Higginbotham, TN Tr. at 1353; Holloway, TN Tr. at 1625).

111. On September 8, 1998, Lochbaum wrote a letter to Shirley Jackson ("Jackson"), then-Chair of the NRC, requesting a meeting to discuss the harassment of Overall (CX 106; Lochbaum, DC Tr. at 59-61).

xvi. The September 9, 1998 Fake Bomb

112. On September 9, 1998, Overall drove to an Office Max store in Cleveland, Tennessee to make copies for a meeting scheduled later that day with Holloway (Overall, TN Tr. at 296, 300). When he returned to his truck in the Office Max parking lot, Overall discovered a "black object, about a foot long" laying in the bed of the truck (Overall, TN Tr. at 301). Overall thought that the object "looked like an explosive device" (Overall, TN Tr. at 302). He returned to the store and asked the store manager if there were surveillance cameras in the store parking lot (Overall, TN Tr. at 302). When the manager replied that the store did not have cameras in the parking lot, Overall described the object in his truck and asked the manager to call the police (Overall, TN Tr. at 303). Overall described the object to a 911 dispatcher who then sent the police, a fire truck, and an ambulance to the scene (Overall, TN Tr. at 303).

113. When Holloway arrived at the Overall residence for a scheduled meeting with Overall, Janice Overall informed her that Overall had called and she described the current situation. Janice Overall informed Holloway that Overall was at the Office Max store awaiting the arrival of the police (Janice Overall, TN Tr. at 923).

114. In the weeks before September 9, 1998, two actual bombs had been exploded in Cleveland (Overall, TN Tr. at 591; Holloway, TN Tr. at 1632). Because of this fact, there was a large law enforcement response to Overall's report, including the Federal Bureau of Investigation, the Bureau of Alcohol, Tobacco, and Firearms, the Cleveland Police Department, and the Chattanooga Bomb Squad (Holloway, TN Tr. at 1424-1425, 1631; Amanda Overall, TN Tr. at 1246).

115. Holloway drove to the Office Max store and met with Overall, where she questioned him about what had taken place. Overall described the black object found in his truck, and he told her that he suspected that the person who put the object in his truck might be from TVA because there were several people at TVA who knew that he would be off work that day (Overall, TN Tr. at 305-06).

116. While Overall was giving a statement to a police officer, the officer called over a paramedic who had arrived on the scene because Overall was feeling as if he might faint. Overall testified that he was "real anxious and worried," and "scared with what was going on" (Overall, TN Tr. at 306-308). Overall was taken directly to the hospital because he was

experiencing chest pain. He was admitted to the hospital under an assumed name for his protection (*Id.*).

117. While he was in the emergency room, a physician told Overall that it was discovered that the "bomb" in the back of Overall's truck "was a hoax" (Overall, TN Tr. at 308). Overall spent three days in the hospital, where he underwent a cardiac catheterization (Overall, TN Tr. at 310).

118. Following the fake bomb incident and his brief hospitalization for chest pain, Overall returned home, where he contemplated suicide (Overall, TN Tr. at 315-316). According to Overall, he had a pistol at home that "was given to me for home protection," and, while at home alone, he "pulled out the gun, loaded it and I stuck it in my mouth and pulled the trigger." Overall stated that the gun "didn't discharge," although there were two bullets in the chamber (Overall, TN Tr. at 315).

119. Following the incident with the pistol, Overall sought treatment from his clinical psychologist, Dr. Leigh, due to stress and depression (Overall, TN Tr. at 316-17). Overall could not return to work at that time because he felt that TVA was not providing a safe working environment, and he worried that his life was in danger (Overall, TN Tr. at 317-18).

120. Overall gave a statement to the police regarding the "fake bomb" incident (Overall, TN Tr. at 313; CX 108). He was informed that the "fake bomb" was sent to the Georgia Bureau of Investigations to look for fingerprints and that he would be contacted if any new information arose about the case. He has not been contacted again by the police regarding the incident (Overall, TN Tr. at 312-13).

121. On September 9, 1998, Harris contacted Lochbaum and informed him of the fake bomb incident (Lochbaum, DC Tr. at 60-61). Lochbaum issued a press release discussing Overall's finding of the fake bomb in his truck (Lochbaum, DC Tr. at 60).

122. During the week of September 15, 1998, Overall was granted paid administrative leave from work by TVA due to his emotional state (Overall, TN Tr. at 318).

123. On the advice of Dr. Leigh, Janice Overall reduced the time she spent selling Mary Kay cosmetics so that she could spend more time with her husband (Janice Overall, TN Tr. at 930-31).

124. On September 10, 1998, Lochbaum sent a second letter to Jackson, notifying her of the Overall fake bomb incident (CX 113; Lochbaum, DC Tr. at 60-61).

125. The device found in Overall's truck was not a bomb of any kind (Overall, TN Tr. at 308; Holloway, TN Tr. at 1634). The Bureau of Alcohol, Tobacco, and Firearms laboratory was unable to identify the person(s) responsible for making or placing the device (Hudson dep. 1 at 68, ex. 4).

126. On September 15, 1998, Purcell convened a stand-down meeting with Watts Bar employees, which included a slide presentation about the threats that had been made against Overall (Purcell, TN Tr. at 1113-15; RX 72).

xvii. The September 9, 1998 S-10 Truck

127. Upon learning of the Office Max "bomb" Janice and Amanda Overall left the Overall residence to go to the Office Max store (Janice Overall, TN Tr. at 924). As they were leaving their residence, someone in an "old S-10 type truck" drove slowly past their home and "looked straight at the house and then at Amanda with a really creepy, dead, cold stare" (Janice Overall, TN Tr. at 924).

128. As Amanda Overall returned home from the Office Max incident with her older brother David, Amanda saw the suspicious white truck again in the neighborhood (Amanda Overall, TN Tr. at 1221). Amanda recorded the license plate number of the truck and wrote down a brief description of the driver and the truck (*Id.* at 1221-1222).

129. Janice and Amanda Overall recorded the license plate number of the truck and later gave that information, as well as the "DID YOU GET THE MESSAGE YET?" note to Ron Hudson ("Hudson"), a TVA OIG investigator who visited the Overall home in an attempt to speak with Overall (Janice Overall, TN Tr. at 928-29; Amanda Overall, TN Tr. at 1243).

130. TVA OIG later determined that the vehicle was registered to a Peter Langdon who was not a TVA employee (Hudson dep. 1 at 245-247). Therefore, no further action was taken as OIG's jurisdiction extends only to TVA employees (Holloway, TN Tr. at 1544-45).

131. In January 1999, Agent Hudson interviewed Mr. Langdon (Hudson dep. 1 at 243-244; dep. Ex. 21). At trial, Mr. Langdon confirmed that on September 9, 1998, he was in Overall's neighborhood on a service call for a customer of the

security alarm company where he was employed (Langdon, TN Tr. at 2073-2074; RX 61).

xviii. The September 17, 1998 Note

132. On September 17, 1998, Overall found an anonymous note on the fence close to his home which read, "CURTIS WATCH YOUR BACKSIDE, YOU ARE BEING SET-UP! BE CAREFULL (sic). HERE ARE MORE SCREW[S] FOUND LAST OUTAGE. YOUR FRIEND" (Overall, TN Tr. at 318-20; CX 129). Screws were attached to the note, which was written on TVA Daily Journal stationery, and dated "9/17/98" (CX 129). Overall identified the screws attached to the note as ice condenser screws, which are only available for ice condenser utilities (Overall, TN Tr. at 322). Overall did not report the note at that time (*Id.* at 321, 761). He gave the screws and the note to Harris, who took them to the Roane County Police Department (Overall, TN Tr. at 647; Harris, TN Tr. at 1049).

xix. The December 21, 2000 Note

133. On December 21, 2000, Janice Overall opened an envelope mailed to the Overall residence which contained a note that read "You need to go" attached to a photocopy of Overall's old Watts Bar site identification badge (Janice Overall, TN Tr. at 937-39; CX 251). Overall testified that he was "shocked" when he saw a photocopy of the note, and that he was "concerned," because he thought the note "related back to the other notes trying to remove me from TVA altogether" (Overall, TN Tr. at 364).

134. Overall's Watts Bar badge and pager were in his possession until at least February 2000 (TN Tr. at 2806), when, following Overall's return to work at the Fossil Power Group, his wife, Janice Overall, sent the Watts Bar badge and pager to Higginbotham by regular mail (Overall, TN Tr. at 361; Janice Overall, TN Tr. at 937, 986-987).

135. Higginbotham never received Overall's Watts Bar badge (Higginbotham, TN Tr. at 2587, 2589). Overall's pager was never received by the Telecommunications Department, the organization in charge of maintaining the pagers at the Watts Bar site (Smith, TN Tr. at 2807).

136. Janice Overall reported the note to Overall's attorneys, who notified TVA, and then instructed Janice to file a police report (Janice Overall, TN Tr. at 938-39; CX 252). She filed a police report with the Cleveland Police Department (*Id.* at 939).

F. TVA Watts Bar On-site Incidents of Harassment

i. The August 5, 1998 Wiggall Comment

137. When Overall returned to Watts Bar for his first day of work on August 5, 1998, he was greeted by Smith and then by Wiggall who stated, "We're here as engineers to not make up problems but find them and correct them" (Overall TN Tr. at 209). Wiggall then apologized to Overall and said that he meant to say, "We're here as systems engineers to find problems and fix them" (Overall, TN Tr. at 210). Overall met with Higginbotham who discussed training requirements with Overall and who then went through the new employee "check in" process (Higginbotham, TN Tr. at 1327). Overall testified that, as a whistleblower, he interpreted Wiggall's comment to be retaliatory and a warning "like don't – don't do anything wrong while you're here" (Overall, TN Tr. at 209).

ii. The August, 1998 Dennis Tumlin Comment

138. Shortly after his return to work at Watts Bar, Overall came in contact with Dennis Tumlin (Tumlin), who worked in the boilermaker shop at Watts Bar. In the presence of 15 other employees, Tumlin greeted Overall with the comment, "There's that whistle-blower" (Overall, TN Tr. at 245-46). Tumlin then told Overall that he was "just kidding" and that Overall was "among friends" (Overall, TN Tr. at 246-47). Overall stated that upon hearing the whistleblower comment, he "kind of looked down at the floor a little bit and kind of got a little, you know, disappointed about his saying that to me" (Overall, TN Tr. at 246). Higginbotham spoke with Tumlin's manager about the incident, and Tumlin was counseled on how his joke was inappropriate and could be misinterpreted (Higginbotham, TN Tr. at 1345-1346). On September 9, 1998, Holloway interviewed Tumlin, who confirmed that he had made the comment but that he had intended it as a joke (Holloway, TN Tr. at 1673-1674; CX 299).

iii. August 25, 1998 Adair Response to Questions About PER 823

139. During the summer of 1998, personnel from TVA's Nuclear Assurance Team opened the ice melt tank used during outages (Jordan, TN Tr. at 2671, 2766-2767). This was the first time the melt tank had been opened since 1995 (*Id.*). An inspection of the melt tank produced 12 broken screw heads (Jordan, TN Tr. at 2766-2767; Wiggall, TN Tr. at 1838-1840). Jordan initiated WBPER980823 (PER 823) on July 17, 1998 as a result of this discovery (CX 442 at 12885). Civil Engineering

was assigned the responsibility for handling the PER as NSSS did not have the capability to perform structural analysis on the screws found, nor was it suited to determine what corrective actions, investigations, or evaluations would be appropriate (Jordan, TN Tr. at 2621-2622; Smith, TN Tr. at 2722; Wiggall, TN Tr. at 1892, 1913, 2108; Adair TN Tr. at 2109-2110). NSSS had no action items or duties concerning PER 823 (Wiggall, TN Tr. at 1890, 1914-1915; Jordan, TN Tr. at 2621-2622, 2673). The assignment of PER 823 to Civil Engineering took place on July 21, 1998 (CX 442 at 12856).

140. In an August 24, 1998 meeting with Overall, Smith informed him that broken stubs of screws were found in the ice condenser during the last inspection (Overall, TN Tr. at 216; Overall, TN Tr. at 2961).

141. Overall contacted Jordan on August 24, 1998, to inquire about the new PER (Overall, TN Tr. at 217-18, 2961-62). Jordan gave Overall the top cover sheet from the PER, and he referred Overall to Adair, the Lead Civil Engineer at Watts Bar, for further information regarding the open PER (Overall, TN Tr. at 217-18, 2961-62). All PERs and information relating to PERs are available to any Watts Bar employee (Jordan, TN Tr. at 2622; Overall, TN Tr. at 217-218).

142. When Overall contacted Adair on August 25, 1998 for further information about PER 823, Adair "responded forcefully and in a hostile manner, wanting to know why [Overall] needed to know" (Overall, TN Tr. at 2963; Adair, TN Tr. at 2180). Smith questioned whether Overall "was asking for documents that weren't specifically related to the tasks that he was assigned to do" (Smith, TN Tr. at 2833).

iv. August 27, 1998 Typewritten Note

143. On August 27, 1998, Overall received a note delivered to his work cubicle in a TVA interoffice mailer which read "LEAVE WATTS BAR, THERE IS NO ROOM FOR WHISTLEBLOWERS HERE OR ELSE" (Overall, TN Tr. at 253-55; CX 88; CX 281). Overall and co-worker Robin Gray reported the note to Smith and Wiggall (Overall, TN Tr. at 261-62; Smith, TN Tr. at 2781-83). Overall testified that the note made him "very upset," and that he "hollered over to my cubicle mate next to me" and he "[threw] the note to the floor in disgust and anger" (Overall, TN Tr. at 260). Overall testified that he started to cry and that he was upset because the note was a direct threat indicating that if he did not leave Watts Bar, some other retaliatory action would take place (Overall, TN Tr. at 260-61). Overall was escorted home by security and placed on leave for the rest of that day

and the following day (Overall, TN Tr. at 264-65; Higginbotham, TN Tr. at 1334-35).

144. On August 28, 1998, in response to the August 27 typewritten note, Purcell met with his subordinates to discuss in general the issue of harassment and, specifically, Overall's situation (Purcell, TN Tr. at 1106; RX 51; Higginbotham, TN Tr. at 1336). Purcell restated TVA's policy of zero-tolerance for any such harassment, and he stated that such harassment was not only counterproductive to safety and performance at Watts Bar, but that it was also strictly prohibited by Federal law (*Id.*; RX 51). A memorandum was sent out and the policy was rolled down throughout the workforce (RX 51; Purcell, TN Tr. at 1106-1107). Purcell notified the NRC of the actions being taken in response to the harassment of Overall (Purcell, TN Tr. at 1108; RX 62).

145. The OIG loaned the August 27, 1998 document to the NRC Office of Investigations for examination (Hickman, TN Tr. at 1436, 1466-1467; Holloway, TN Tr. at 1671; CX 372). The NRC Office of Investigations conducted interviews of 12 individuals, either through a questionnaire-based interview or a personal interview, and returned the documents with a forensic report (Holloway, TN Tr. at 1499-1502).

v. The Doug Williams Incident

146. While departing the building on August 27, 1998, Overall was approached by Doug Williams (Williams), a Maintenance Specialist who used to car-pool with Overall. Williams told Overall that he was not pleased that his name was mentioned in Judge Kennington's Decision, wherein it was discussed that Williams did not have a degree, but that he was allowed to remain at Watts Bar (Overall, TN Tr. at 265-66). Overall informed Williams that he was welcome to speak with Overall's attorney about the situation (Overall, TN Tr. at 267).

147. Overall reported the note, the truck incident, and his complaints about not being involved with work activities at Watts Bar to Holloway, who told Overall that she would look into it (Overall, TN Tr. at 268).

vi. The August 29, 1998 Voice Mail

148. On Sunday, August 30, 1998, Overall called Watts Bar to check his voice mail messages and received a message which consisted of a whistle being repeatedly blown (Overall, TN Tr. at 269). The time and date stamp on the voice mail showed that it was left at 1:47 p.m. on August 29, 1998 (Overall, TN Tr. at 159l; Holloway, TN Tr. at 1616). Overall testified that the voice mail message "struck me bad and really hard mentally" in light of the notes and other incidents that had occurred (Overall, TN Tr. at 269-70).

149. Overall reported the voice mail message to Holloway and Smith (Overall, TN Tr. at 271; Holloway, TN Tr. at 1616; Smith, TN Tr. at 2787). TVA OIG investigated the incident, but as TVA's telephone system uses a central telephone trunk line through which all telephone calls to TVA are routed, it was impossible to trace the voice mail call to Overall's work telephone (Hudson dep. 1 at 94-97).

150. Overall was granted sick leave on Monday, August 31, 1998, and he returned to work on Tuesday, September 1, 1998 (Overall, TN Tr. at 272).

vii. September 3, 1998: Adair Enters Meeting

151. On September 3, 1998, Overall was meeting with NRC inspectors when "right before I was to leave, or we were getting close to winding up," Adair entered the meeting room unannounced, said "Excuse me," and stood inside the meeting room (Overall, TN Tr. at 285). "We were pretty much wound up, so I just wanted to get out of there" (*Id.*). Overall testified that he felt Adair was "encroaching on our conversation," and "nosing around and trying to find out what [Overall] was doing up there" (Overall, TN Tr. at 286).

152. Adair was aware that the NRC inspectors were using that particular room, and he had heard that Overall would be meeting with them (Adair, TN Tr. at 2183). Adair had no knowledge of what was to be discussed, and he had no recollection of interrupting the meeting (Adair, TN Tr. at 2183-2184).

viii. The September 4, 1998 Message on the Bathroom Wall

153. On September 4, 1998, Higginbotham was informed by his supervisor, Jill Wallace, that an employee of John Kammeyer (a design engineering manager who worked on the same floor as Overall), had discovered writing on a restroom lavatory wall at Watts Bar (Higginbotham, TN Tr. at 1287). The writing on the restroom wall read "GO HOME ALL WHISTLEBLOWERS NOW" (Higginbotham, TN Tr. at 1287; CX 295; RX 210). Kammeyer posted an "Out of Order" sign on the stall where the writing was located and he then instructed another employee, Harold Johnson, to take pictures of the writing (Higginbotham, TN Tr. at 1291-2; CX 295). The wall was painted immediately after the pictures were taken (Higginbotham, TN Tr. at 1294). The HR office at Watts Bar was notified of the message, as was the TVA OIG (Higginbotham, TN Tr. at 1287-1288, 1350; RX 55 at 1).

154. The restroom where the writing was discovered was located on the same floor where Overall worked, but it was located on a different side of the building (Higginbotham, TN Tr. at 1289). Overall did not personally see the note written on the restroom wall, but he overheard other employees speaking about it (Overall, TN Tr. at 288, 290). Overall testified that the bathroom stall writing did not affect him "very strong," because he "hadn't seen the note or whatever was written on the wall" (Overall, TN Tr. at 289).

155. Holloway did not inspect the stall for fingerprints because she believed that what "we would have needed would've been the actual pen" that was used to write the note (Holloway, TN Tr. at 1620). "With it being a public place, [Holloway didn't] think fingerprints would have been of that much value…." (*Id.*). No attempt was made to determine who was in that building during the evening and early morning before the discovery of the note (*Id.* at 1752). Holloway reported that "almost everybody that worked in that building had been there from seven or seven thirty until nine thirty that morning," making the process of narrowing candidates by reviewing sign-in records a time consuming and nonproductive exercise (*Id.*)

ix. Overall Expresses Concern Over Exclusion from Meetings

156. On August 26, 1998, Jordan told Smith that Overall expressed concerns that he was being excluded from meetings (Jordan, TN Tr. at 2632-33; Smith, TN Tr. at 2772). Smith called Higginbotham and stated that he was concerned that Overall was having issues with the ice condenser and not talking to Smith about them (Higginbotham, TN Tr. at 1275-76; CX 84). Smith reported to Higginbotham that he received a fax from Jordan regarding an Ann Harris speech, wherein Harris was discussing problems that Overall had with the ice condenser system (Higginbotham, TN Tr. at 1277-78; CX 84; Smith, TN Tr. at 2841-45; CX 81).

157. During August 1998, Jordan had a discussion at his work station with Smith, Wiggall, and Paul Law (Law) in which he displayed photographs of debris found in the ice condenser system at D.C. Cook (Overall, TN Tr. at 2972-2973, 3004). Jordan also discussed his recent trip to D.C. Cook where he studied their problems in order to address them at Watts Bar (*Id.*). Overall was not involved in this discussion (Smith, TN Tr. at 2871), but Jordan later showed Overall the photographs when Overall came to Jordan's workspace (Overall, TN Tr. at 2972-2973). The photographs in question were posted and available to any employee via a common drive on the Company's computer system (Jordan, TN Tr. at 2726-2727).

158. The ice condenser utility group, which Overall had helped start, had become more active due to increased NRC scrutiny of ice condenser plants (Overall, TN Tr. at 2821-2822; Jordan, TN Tr. at 2707-2709; Wiggall, TN Tr. at 1923). Smith forwarded applicable e-mail messages from the group to Jordan for further inquiry, but he did not forward such messages to Overall (Smith, TN Tr. at 2824-2825). Smith and Jordan were current members of the owner's group but Smith did not ask Law, the backup engineer, or Overall to become a member of the ice condenser utility group (*Id.* at 2923). Jordan did not forward the group's e-mails to Overall because Overall's name was not on the electronic distribution list (Jordan, TN Tr. at 2710). Higginbotham told Overall that the NSSS was a longstanding group to which Overall was a recent addition and that with time he would become more involved with the organization (Higginbotham, TN Tr. at 1348-1349).

159. Overall was invited by Smith to attend an ice condenser symposium, which was held August 18, through August 20, 1998 in Chattanooga, Tennessee. The symposium was held in order to discuss issues concerning the ice condensers in various

plants. Overall initially accepted the invitation, but later declined to attend, based upon the advice of his attorney (Overall, TN Tr. at 222-23; Smith, TN Tr. at 2758).

160. Higginbotham spoke with Wiggall regarding Overall's concerns about being excluded. Wiggall responded that Overall "was going to be assigned certain things" to work on and that "he wasn't going to be involved in every issue associated with the ice condenser" (Wiggall, TN Tr. at 1831-1832). Wiggall then told Overall "that we weren't trying to exclude him from issues, just there are certain one's that he'd work on and certain one's other people would work on" (*Id.*).

161. On September 1, 1998, Overall informed Higginbotham that he was concerned that he was not asked to attend meetings about the ice condenser. Overall told Higginbotham that he had already spoke to Wiggall and Smith about his concerns (Higginbotham, TN Tr. at 1347-48; Overall, TN Tr. at 3008-09; RX 28; CX 95).

162. In response to his September 1, 1998 discussion with Overall, Higginbotham contacted Wiggall, who said he would discuss Overall's concerns with Smith (Higginbotham, TN Tr. at 1348-49; Wiggall, TN Tr. at 1884-85; CX 96).

163. Jordan and Smith did not convene meetings with everyone in the NSSS group to discuss specific issues nor did Jordan always invite his back up engineer to all meetings (Jordan, TN Tr. at 2633; Smith, TN Tr. at 2772-2773). Smith would typically talk to Jordan and if Jordan felt someone else's presence was necessary for that topic, Jordan would request their presence (Smith, TN Tr. at 2772-2773). Jordan normally "doesn't go round up the whole team. I don't go get my supervisor. It's kind of a – you know, what the meeting's about, who it needs to involve, as to who actually goes and attends that meeting" (*Id.* at 2633).

x. Overall's Security Clearance is Revoked

164. Overall received a September 30, 1998 letter from Ron Casey, Manager of TVA Corporate Nuclear Security, stating that his security clearance was being temporarily suspended (Overall, TN Tr. at 327; CX 136; RX 129 at CCO 00464). TVA had received two letters from Overall's psychologist, Dr. G. Gary Leigh, in which Dr. Leigh discussed Overall's ability to return to work (CX 136; RX 129 at CCO 00464). Mr. Casey's letter to Overall stated that Dr. Leigh had relayed to TVA authorities:

> Certain psychological problems you were experiencing, including occasional suicidal ideation and other stress-related symptoms. Dr. Leigh also advised that it would be clinically unwise for you to return to work at Watts Bar or any other TVA site due to the debilitating effects on your psychological state of mind. In his opinion, your return to work would only exacerbate your already fragile condition. Dr. Leigh further stated that given your emotional state, he doubted that you could pass a fitness for duty evaluation to return to work (CX 136; RX 129 at CCO 00464).

Based on Dr. Leigh's opinions, TVAN's designated psychologist recommended a temporary suspension of Overall's unescorted nuclear plant access clearance (*Id.*).

165. Overall met with TVAN psychologist, Dr. Patrick Lavin, in May 1999 to re-evaluate Overall's condition (Overall, TN Tr. at 344-345). Dr. Lavin contacted Dr. Leigh and requested Dr. Leigh's diagnosis, prognosis, opinions, and recommendations concerning Overall (RX 129 at CCO 00496). On May 27, 1999, Dr. Leigh responded that Overall had depression (*Id.* at CCO 00499), and he opined that:

> He has recently achieved a re-stabilization of his symptoms, but I would anticipate that if he returns to his previous work site that he would re-experience the primary symptoms of anxiety, hypervigilance, moodiness, probably anxiety attacks and possible panic attacks, sleep disturbance and re-emergence of somatic correlates of anxiety. I initially thought that if he was placed in a job site remote from his previous one that he might be able to perform duties in an emotionally stable manner, but now I am not sure and I cannot provide you with any assurance that he can. His emotional stability and behavioral reliability is now unpredictable and vulnerable to disruption (*Id.*).

166. Kevin R. Ferguson, M.D., Overall's psychiatrist, defined hypervigilance as "being like overly cautious or aware of your situation, looking around, being on guard and not being able to relax because of the need to keep your awareness up" (CX 397 at 32).

167. On August 30, 1999, Dr. Lavin sent a second letter requesting a diagnosis and opinion from both Dr. Leigh and Dr. Ferguson (RX 129 at CCO 00514). On August 31, 1999, Dr. Ferguson responded and opined that "if Mr. Overall were to

return to work at TVA at this time, his feelings of depression and paranoia will intensify significantly, and he will not be able to function on the job-site in an emotionally stable manner" (RX 129 at CCO 00515-516).

168. On October 12, 1999, Ron Casey informed Overall that his unescorted security clearance had been denied (Overall, TN Tr. at 346-347; CX 199). This decision was based on Dr. Lavin's opinion that Overall showed "psychological characteristics that could adversely impact emotional stability and impact behavioral reliability in the workplace" (*Id.*). Dr. Leigh and Dr. Ferguson both stated their opinion that Overall "will not be able to function on the job site in a emotionally stable manner" (CX 401 at 1551).

169. On October 12, 1999, Overall's counsel asked Dr. Leigh to clarify his opinion (CX 410). Dr. Leigh clarified his opinion, stating that Overall did not pose a danger to others, only to himself (*Id.*).

170. In a December 6, 1999 letter, Casey informed Overall that his security clearance was being reinstated based upon Dr. Lavin's recommendation which, in turn, was based on the new psychological opinions initiated by Overall's counsel which were not available at the time of the October 12, 1999 denial (CX 207).

G. TVA Requests TVA OIG to Investigate Overall Allegations of Harassment

171. On June 3, 1998, TVA Nuclear formally requested that TVA OIG initiate an investigation of Overall's allegations of harassment (Hickman, TN Tr. at 1390-1391). This investigation was assigned to Nancy Holloway, a TVA OIG Special Agent (Holloway, TN Tr. at 1477, 1560-1561).

172. Agent Holloway has been with the OIG since its inception in 1986 (Holloway, TN Tr. at 1555-1556). She has eight years' experience in conducting "audits of fraud, waste and abuse on any and all TVA programs, including contract fraud, [and] actions by employees…" (Holloway, TN Tr. at 1556). Agent Holloway transferred within OIG to the section responsible for investigations in 1994 (Holloway, TN Tr. at 1556). Agent Holloway trained at the Federal Law Enforcement Training Center and she has received training in interview techniques (Holloway, TN Tr. at 1559-1560). She has worked on a previous whistleblower case regarding a complaint by Ms. Harris (Holloway, TN Tr. at 1560).

173. On June 5, 1998, Holloway prepared an Investigative Plan for TVA OIG's investigation of Overall's complaints (CX 258). This document set forth recommendations as to equipment needed for the investigation, and it included a night vision camera to be installed at the Overall's residence and a recording device to be installed on the Overall's telephone (CX 258; *see also,* Holloway, TN Tr. at 1480, 1482). Holloway later testified that the night vision camera was not utilized due to problems with installation, and the Overall's caller ID system was used in place of the recommended telephone recording device (*Id.* at 1482). TVA OIG did not conduct surveillance of Overall to determine where he went or if others were following him (*Id.* at 1704).

174. As part of the ongoing investigation, Holloway testified that TVA OIG transmitted one of the alleged harassing notes to the Tennessee Bureau of Investigations for analysis of a latent fingerprint found on the note (Holloway, TN Tr. at 1692-1695). Fingerprint cards for several TVA employees, including Overall, were sent to Tennessee Bureau of Investigations for comparison (*Id.*). Tennessee Bureau of Investigation issued its report on January 17, 2002 (RX 253), stating that the latent fingerprint evaluated was not identifiable and did not have "comparison value" to any of the submitted fingerprint cards (RX 253).[7]

175. Ten C.F.R. § 73.57(f)(5) (2002) requires licensees such as TVA to "retain all [employee] fingerprint cards and criminal history records received from the FBI" for the duration of the individual's employment and for one year after the individual's site access is terminated (CX 497). During the trial of this action, the NRC investigated "whether [TVA] destroyed fingerprint cards in violation of NRC regulations. The evidence developed during this investigation did not

[7] TVA filed a Motion for Admission of New Evidence on February 19, 2002, seeking to admit the Tennessee Bureau of Investigation report as RX 253 pursuant to 29 C.F.R. § 18.54(c). Under § 18.54(c), "Once the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record." As the Tennessee Bureau of Investigation report was not produced or available until January 17, 2002, and as Complainant's counsel has referenced the lack of production of this report in its reply brief (*See* Overall reply brief at 18-19), I find that this evidence was not available prior to the close of the record and that it is new and material evidence pursuant to § 18.54(c). I admit the Tennessee Bureau of Investigation report into evidence as RX 253.

substantiate that TVA destroyed fingerprint cards in violation of the NRC regulation" (RX 254).[8]

176. In September, 1998, responsibility for the Overall investigation was transferred to Agent Hudson, a former police officer, a four-year veteran of the FBI, and a special agent with the OIG since 1987 (Hudson dep. 1 at 10, 13, 15; Holloway, TN Tr. at 1553).

177. On January 6, 1999, TVA Assistant Inspector General Donald Hickman (Hickman) sent a letter to Overall's attorney, requesting that Overall be made available to provide handwriting samples and to undergo a polygraph exam (Overall, TN Tr. at 338-39; Hickman, TN Tr. at 1386-87; CX 146).

178. TVA's Inspector General announced that it was offering a $10,000 reward for help in finding someone involved in the Overall case (Harris, TN Tr. at 1388-89).

H. Events Subsequent to Overall leaving Watts Bar in September 1998

179. On December 21, 1998, an article was published in the *Nashville Tennessean* about Overall's discovery of broken ice basket screws at Watts Bar and the effects of his reports on other nuclear plants (Overall, TN Tr. at 333-34; CX 143).

180. On January 16, 1999, the *Nashville Tennessean* published an article discussing TVA's request that Overall submit to a polygraph test and provide handwriting samples (Harris, TN Tr. at 1387-88; CX 149).

181. In August 1999, while still on paid administrative leave, Overall was invited to attend a rally to discuss complaints and problems at the D.C. Cook plant located in Bridgman, Michigan (Overall, TN Tr. at 351). He declined to participate in the rally; however, it was erroneously announced on an internet website that Overall was scheduled to participate

[8] TVA filed a Motion for Admission of New Evidence on July 25, 2002, seeking to admit the NRC investigative report as RX 254 pursuant to 29 C.F.R. § 18.54(c). Under § 18.54(c), "Once the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record." The NRC investigative report was not produced or available until July 2, 2002, and as the Complainant has referenced missing fingerprint cards in its argument (*See* Complainant's Post-Hearing Findings of Fact and Conclusions of Law at 110; Holloway, TN Tr. at 1515-1517), I find that this evidence was not available prior to the close of record and that it is new and material evidence pursuant to § 18.54(c). I admit the NRC investigative report into evidence as RX 254.

in the rally (Overall, TN Tr. at 351-52; Harris, TN Tr. at 1057).

182. In August 1999 Smith's secretary received a call from an acquaintance at the D.C. Cook plant, who informed her that there was going to be an "ice condenser protest" at the D.C. Cook plant and that Overall was to be participating (Smith, TN Tr. at 2801). Smith's secretary passed this information on to Smith (*Id.*).

183. Smith was concerned that Overall might be involved in the protest while receiving paid administrative leave from Watts Bar (Smith, TN Tr. at 2846, 2850, 2886). He asked his counterpart at the D.C. Cook plant to contact him if he knew anything about the participants in the protest (Smith, TN Tr. at 2801). In response to his request for information, Smith received an e-mail in August 1999 from "somebody in public relations at the D.C. Cook plant," which stated that a TVA whistleblower was scheduled to attend a protest. The e-mail also included the website address of the protest (Smith, TN Tr. at 2801). Suspecting that Overall was the TVA whistleblower involved in the protest, Smith viewed the protest website, where he read that Overall was scheduled to be a participant in the protest. He copied the information from the protest website and forwarded it to James Maddox, the Manager of Nuclear Engineering, and Higginbotham (Smith, TN Tr. at 2802).

184. On February 28, 2000, Overall returned to work at TVA's Fossil Power Group Division in Chattanooga, Tennessee, where he is presently employed as an Engineering Operations Specialist (Overall, TN Tr. at 352).

185. At the Fossil Power Group, Adair serves as Overall's third-line supervisor (Overall, TN Tr. at 353). Adair has recused himself from any decisions concerning Overall (*Id.* at 2150, 2191). All work assignment and day-to-day affairs are handled by Lenny Peterson and Lee Nash, Overall's first and second-level supervisors (Adair, TN Tr. at 2149-2150). Any administrative actions involving Overall bypass Adair and proceed on directly to Adair's boss, Walt Elliott (Adair, TN Tr. at 2150).

186. On May 29, 2000, the *South Bend Tribune* published an article about Overall and his concerns about the ice condenser system at Watts Bar as part of a five-part series about the D.C. Cook Nuclear Plant (CX 240).

I. Expert Testimony and Reports

At the formal hearing, Overall presented expert testimony from a forensic document expert, David P. Grimes, who prepared one report. TVA presented expert testimony and reports from three forensic document experts, Grant Sperry, Larry Miller, and Gerald Richards, and two reports from forensic document expert Arthur Bohanan.

1. David Grimes

David P. Grimes (Grimes) testified on behalf of Overall and recounted the findings of his report (Grimes, DC Tr. at 230-367; CX 254). Grimes was certified as a document examiner in 1973 and has worked as a document examiner from that time forward (Grimes, DC Tr. at 231). He has a Master's Degree in Forensic Science (Grimes, DC Tr. at 233; CX 254-A). Grimes submitted one report, in which he examined nine questioned documents and a known writing of Curtis Overall consisting of extensive non-dictated and dictated writing (Grimes, DC Tr. at 242; CX 254). He also reviewed reports by Art Bohanan, Grant Sperry, Larry Miller, and the Georgia Bureau of Investigations (GBI) (Grimes, DC Tr. at 242-43).

Grimes testified that there is a "five-level system" regarding conclusions that can be reached following a document analysis.[9] The five levels include: (1) no conclusion, which means that a writer can be neither eliminated nor identified, based upon the writing; (2) identification, meaning that the expert has identified all the handwriting characteristics present in the questioned writing, and can explain his findings to a jury or a judge as to how he arrived at that conclusion; (3) nonidentification or elimination, which means that a writer could not possibly have written the questioned writing; (4) a leaning that a person may have written the questioned writing, and request for additional examination; and, (5) a leaning that a person may not have written the questioned writing because a characteristic in the writing is not present in the known writing of that person (Grimes, DC Tr. at 244-45). Grimes stated that "disguised writing," when a person eliminates his normal handwriting characteristics, often cannot be identified depending upon the degree of the disguise (Grimes, DC Tr. at 246-47).

Grimes stated that the "Silkwood" note is such a disguised writing because the letters are formed in a block-type format,

[9] This "five-level system" was validated by TVA expert Gerald Richards who testified that a majority of Forensic Document Examiners use a graduated scale of five to nine levels to reflect their conclusions (*see* RX 168).

which is not suitable for comparison with normal handwriting (Grimes, DC Tr. at 249-50; CX 254, 46). He opined that the "Boo" note (CX 66) is disguised writing, consisting of a "line tremor" with different strokes which is not normal handwriting (Grimes, DC Tr. at 251). Grimes opined that the "Stop it now" note (CX 59), the "did you get the message yet?" note (CX 103), the "Go home all whistleblowers now" writing (CX 295), and the note written on TVA Daily Journal stationery, reading "Curtis, watch your back. You are being set up …" (CX 129), are all disguised writings, and not identifiable with any particular person's handwriting (Grimes, DC Tr. at 252-255, 260-61).

According to Grimes, the handwriting on the TVA interoffice mailer (CX 281-A) is "more normally prepared than the other documents," but is still unidentifiable as Overall's writing, because "there are characteristics present in the signature, or hand printed name, that are not present in [Overall's] known writing" and there are inconsistencies in the writing of certain letters and tremor in some of the letters (Grimes, DC Tr. at 255).

Regarding the cut and pasted letters on the "You need to go" note (CX 259), Grimes testified that it is unidentifiable because there is no handwriting on the note (Grimes, DC Tr. at 261). In evaluation of the August 27, 1998 typewritten note stating: "Leave Watts Bar. There is no room for whistle blowers here or else" (see FoF ¶ 143), Grimes testified that he received a photocopy of this document and could not determine whether it was typewritten or computer generated (Grimes, DC Tr. at 256-57). Therefore, Overall's typewriter cannot be identified as the source of this writing (Grimes, DC Tr. at 258-59).

Grimes concluded that none of the writings he examined were identifiable, largely due to the use of disguised writing (Grimes, DC Tr. at 270). Upon review of both the reports and the videotapes of examinations conducted by TVA experts Sperry and Miller, Grimes opined that it was inappropriate for Sperry and Miller to ask Overall to disguise his handwriting because "you want their normal handwriting characteristics for comparison" (Grimes, DC Tr. at 306-07).

2. Arthur Bohanan

Holloway[4] testified that two reports were received from Arthur Bohanan (Bohanan) of Bohanan's Forensic, Inc., dated October 29, 1998 and November 30, 1998 (Holloway, TN Tr. at 1652, 1655; RX 81, 82). In his October 29, 1998 report, Bohanan examined seven questioned writings: (1) the "Silkwood" note; (2) the "Boo!" note; (3) the "Stop it now" note; (4) the "Did you get the message yet?" note; (5) the "Go home all whistleblowers now" note; (6) a brown government envelope with holes, bearing several addressee's names, including Curtis Overall; and, (7) a photocopy of a typed message, which read, "Leave Wats [sic] Bar There Is No Room For Whistle Blowers Hee [sic] Or Else!!!" (RX 81). Bohanan also examined eleven known writings of Curtis Overall, including his writing on TVA memos, questionnaires, and visitor logs (RX 81). Regarding items numbered 1 through 4 above, Bohanan concluded that "[t]here are no outstanding characteristics to complete a good comparison with the known writings [of Overall]" (RX 81). Item 5, the "Go home all whistleblowers now" note, was compared with Overall's writing, and "certain similarities [were] seen" in the formation of individual letters in this writing and in Overall's known writing. Item 6, the writing on the brown government envelope addressed to Overall, was determined to be disguised writing, because the "C" in Curtis and the "O" in Overall were embellished in size. Bohanan concluded that "Curtis C. Overall did write the name of Curtis Overall on [the brown government envelope]. Regarding item 7, the typed message, Bohanan wrote that there is "nothing to compare back to the known writings furnished."

In a supplemental report dated November 30, 1998, Bohanan wrote that he "requested additionally known writing of Overall for additional examination and comparison." He reported that the known writings of Overall were "in the form of three ringed notebooks" (RX 82). Bohanan examined the photocopy of plain paper with the words "Go home all whistle blowers Now," and concluded that "Curtis C. Overall probably wrote [the document]," because similarities were seen "between the "m", "L", "I", "s", "r" and "e". He wrote that "[t]he additional writing [from Overall] did supply more printed writings which did help to render a better opinion." According to Bohanan, the other letters used in the note "are not significantly different from Overall's known writings except the disguise used" (RX 82).

[4] Holloway was assigned to the Overall case on June 5, 1998, and removed from the case on September 21, 1998, when Hudson took over the investigation (Holloway, TN Tr. at 1653). Hudson left the investigator's office on December 14, 1999, at which time Holloway was reassigned to the case (*Id.*).

3. Grant Sperry

TVA obtained two reports from Grant Sperry (Sperry), dated December 28, 1998 and March 25, 1999 (CX 336, RX 103). Sperry is currently employed by the United States Postal Inspection Service Forensic Laboratory in Memphis, Tennessee as a Forensic Document Analyst (Sperry, TN Tr. at 2198-99). He testified that he has been employed as a Forensic Document Examiner for twenty-two years (Sperry, TN Tr. at 2199). He received his initial two-year training in document analysis at the U.S. Army Criminal Investigation Laboratory and was certified by the Department of the Army and the CID Command as a Forensic Document Examiner (Sperry, TN Tr. at 2219-20). Sperry received additional training in document analysis from the FBI, the Secret Service, the Royal Canadian Mounted Police Laboratory, the GBI, the International Symposium of Questioned Document Examiners, the Immigration and Naturalization Laboratory, the Central Intelligence Agency Laboratory, the Rochester Institute of Technology, and "various other seminars and short courses" (Sperry, TN Tr. at 2200). Sperry is certified by the American Board of Forensic Document Examiners, and takes proficiency tests yearly (Sperry, TN Tr. at 2201; CX 336)).

At the formal hearing, Sperry recounted the findings of his December 28, 1998 and March 25, 1999 reports (CX 336; RX 103). He stated that he examined the questioned writings, including: (1) the "Silkwood" note (CX 46); (2) the "Boo" note (CX 56); (3) the "Stop it now" note (CX 59); (4) the "Did you get the message yet?" note (CX 103); (5) the government envelope addressed to Overall (RX 192); (6) digital photographs of the "Go home all whistleblowers now" note (RX 210); (7) the "Curtis, watch your back side …" note (CX 129); and, (8) the typed script message "Leave Watts Bar. There is no room for whistleblowers here or else" (CX 88) (Sperry, TN Tr. at 2203-04). According to Sperry, he compared the questioned writings to "a packet of copies of writings that I used, both as course of business writings of Curtis Overall, as well as exemplar or writings that were requested that Mr. Overall provided" (Sperry, TN Tr. at 2208). He stated that on August 7, 2000, Overall provided exemplars of his handwriting at the TVA office (Sperry, TN Tr. at 2209).

Regarding the results of his studies, Sperry testified that he "could not identify, nor eliminate Mr. Overall as the writer of [the Silkwood note (CX 46), the "Boo" note (CX 56), the "Stop It Now" note (CX 59), and the "Curtis, watch your backside …" note (CX 192)] (Sperry, TN Tr. at 2216). Sperry stated:

> Cross comparison wise - - that means literally comparing between the various questioned, [CX 129, 103, and RX 210], there's certainly evidence of one writer. And those were the, again, the three documents that I've associated with Mr. Overall.
>
> Complainant's Exhibit 46, 56, and 59, I found that there is some evidence that those three questioned documents, reading "Silkwood," "Boo," and "Stop it now," were produced by the same person, whomever that may be.

(Sperry, TN Tr. at 2216-17).

Sperry testified to common features and characteristics observed in Overall's handwriting as produced in the exemplars which were also seen on the "Go home all whistleblowers now," and "Curtis, watch your back side …" notes (RX 162B; Sperry, TN Tr. at 2218-34).

Regarding the typed script message "Leave Watts Bar. There is no room for whistleblowers here or else" (CX 88), Sperry testified that he examined the original of that document and a copy made prior to its being processed for latent finger prints (Sperry, TN Tr. at 2239). He stated that he conducted a microscopic examination, which "didn't yield much information simply because I was conducting a microscopic examination of a toner or copy entries" (Sperry, TN Tr. at 2239). He also used "a grid to determine escapement, that is how many spaces per inch is represented by the type script," and determined "that this particular font was typed at a setting of ten characters per inch," and is "a Courier type of a font … consistent with a Brother Brougham 10, and perhaps other Courier fonts of the Courier family" (Sperry, TN Tr. at 2239-40). Sperry compared the note to exemplars from Overall's typewriter, a Brother Brougham (Sperry, TN Tr. at 2244). Sperry concluded that he "could not identify nor eliminate Mr. Overall's typewriter as having produced [the typewritten note] (Sperry, TN Tr. at 2248). He also found that correspondence generated by Overall, including an April 1, 1998 typewritten letter from Overall to Scope Mechanical Contractors, an April 1, 1998 typewritten letter from Overall to American Electric Power, and a May 19, 1999 typewritten letter from Overall to Charles Van Beke, had the same font characteristics and vertical misalignment (RX 213; Sperry, TN Tr. at 2248-49).

4. Larry Miller

At the formal hearing, Larry Miller (Miller) testified regarding his October 20, 2000 report (RX 167). Miller is a

Professor and Head of the Department of Criminal Justice and Criminology at East Tennessee State University in Johnson City, Tennessee (Miller, TN Tr. at 1948-49; RX 167A). He is a Questioned Document Examiner for the State of Tennessee, and interned for two years with the former Questioned Document Examiner for the State of Tennessee. He has an Associate Degree in Law Enforcement, a Bachelor and Master of Science Degree in Criminal Justice, and a Doctor of Philosophy Degree in Public Health and Safety (Miller, TN Tr. at 1949). He is a graduate of the Federal Law Enforcement Training Center at the United States Secret Service School on Questioned Document Examination (Miller, TN Tr. at 1949-50). Dr. Miller is a Board-certified Forensic Document Examiner and a member of the American College of Forensic Examiners (RX 167A).

In his October 20, 2000 report, Dr. Miller analyzed seven questioned writings: (1) the "Silkwood" note (CX 46); (2) the "Boo!" note (CX 56); (3) the "Stop it now" note (CX 59); (4) the "Did you get the message yet" note (CX 103); (5) photographs of the "Go home all whistleblowers now" message (RX 210); (6) the government envelope addressed to Curtis Overall (RX 192); and, (7) the daily journal paper with the note, "Curtis watch your backside …" (CX 129). Dr. Miller also examined two known handwriting exemplars of Curtis Overall (RX 167; Miller, TN Tr. at 1959-60), and he and Sperry obtained various handwriting samples from Overall in August 2000 (Miller, TN Tr. at 1960; RX 169). In the August 2000 examination, Overall was asked to disguise his handwriting and to write with both his right and left hands (Miller, TN Tr. at 1961-62). Based upon his examination of the questioned writings and the known writings of Curtis Overall, Dr. Miller opined: (1) there is no indication that the seven questioned writings were written by more than one individual; (2) there are indications that Curtis Overall authored questioned writings 1-3; (3) there are strong indications that Curtis Overall authored questioned writings 4-7; and, (4) the disguise patterns utilized in executing the seven questioned documents were in keeping with the manner that Curtis Overall used when he was asked to disguise his handwriting in known exemplars (RX 167).

At the formal hearing, Dr. Miller testified that, in order to analyze the questioned writings, he examined the writings, "letter by letter . . . in comparison with Mr. Overall's course of business writings and request [sic] writings that we took" (Miller, TN Tr. at 1963). He stated that he made side-by-side comparisons of the writings (Miller, TN Tr. at 1963-64). He opined that there are no significant dissimilarities between the seven questioned writings and Overall's known handwriting exemplars (Miller, TN Tr. at 1985). He stated that he "had a

stronger opinion" regarding the last four questioned writings, "just because of the amount of writing that was present . . . [b]ut there were indications or strong indications that Mr. Overall was the writer of these seven questioned items" (Miller, TN Tr. at 1985). However, Dr. Miller testified that he could not render a positive identification, because there was not a sufficient amount of writing in the questioned writings, and because the type of disguise patterns used in the questioned writings [square-box disguise patterns] are common (Miller, TN Tr. at 1986). Dr. Miller concluded that he was not able to "identify" Overall as the writer of the questioned writings, "but [was able] to make indications that [Overall] was the author [of the questioned writings]" (Miller, TN Tr. at 1986).

5. Gerald Richards

Gerald Richards (Richards) was retained by TVA to testify as an expert witness (Richards, DC Tr. at 403). He did not conduct handwriting comparisons or typewriting comparisons for TVA, but was retained to determine if certain types of questioned document examinations were reasonable to conduct (Richards, DC Tr. at 403). Richards is a private examiner of questioned documents and photographs, a consultant, and an educator (Richards, DC Tr. at 390). He has been a questioned document examiner for 28 years (*Id.*; RX 168-A). He has a Bachelor of Science Degree in Photography, and a Master of Science Degree in Secondary Education, from Southern Illinois University (Richards, DC Tr. at 391; RX 168-A). He took post-graduate courses at George Washington University and was a Special Agent with the Federal Bureau of Investigations (FBI) from 1970 to 1993 (*Id.*). He is certified in questioned document examination and photographic examinations by the FBI and the American Board of Forensic Document Examiners (Richards, DC Tr. at 392; RX 168-A).

Richards issued an April 13, 2001 report which was admitted into the formal record as rebuttal to Mr. Grimes' testimony and report (Richards, DC Tr. at 452; RX 168). He wrote that, although positive identification or elimination is uncommon in most examinations involving disguised writing, it is possible to reach a definitive conclusion, depending upon the degree of the disguise, the writer's skill level in disguising their writing and the availability of a sufficient number of individualizing characteristics (RX 168). According to Richards, the vast majority of Forensic Document Examiners use a graduated scale, ranging between five and nine levels, to reflect their conclusions (*Id.*). The extremes of the scale are "identification" and "elimination," and the mid-point of the scale is "no conclusion" (RX 168).

Although he did not review any of the seven questioned writings in his report, Richards viewed the "Silkwood" note (CX 46), the "Boo" note (CX 56), and other questioned writings [CX 59, 103, 295, 129] at the formal hearing, and opined that, although it is possible to do a handwriting analysis on these documents, it is "highly unlikely" that an examiner could render a positive conclusion as to the author of the note, due to small number of characteristics, and the possibility that this may be disguised handwriting (Richards, DC Tr. at 459-73).

6. Conclusions of the Document Examiners

Handwriting comparison testimony has long been a feature of litigation in Federal Courts. *See, e.g., Neall v. United States*, 118 F. 699 (9th Cir. 1902). As one Court stated:

> Handwriting analysis typically involves reviewing two samples, a known sample and an unknown one, to determine if they are similar… Experts agree that unlike DNA or even fingerprints, one's handwriting is not at all unique in the sense that it remains the same over time, or uniquely separates one individual from another. Everyone's handwriting changes from minute to minute, day to day. At the same time, our handwriting is sufficiently similar to one another so that people can read each other's writing. Given that variability, the 'expert' is obliged to make judgments – these squiggles look more like these, these lines are shaped more like these, etc.

United States v. Hines, 55 F.Supp. 2d 62, 69 (Mass. 1999).

On February 20, 2002, Overall's counsel filed Complainant's Notice of New Authority, bringing the case of *United States v. Llera Plaza*, 179 F.Supp. 2d 492 (E.D. Pa Jan. 7, 2002) to this Court's attention. The Complainant proffered this new case in support of an argument that TVA's handwriting experts should be limited in their testimony to observations of similarities and differences between known documents and questioned documents.

On March 20, 2002, TVA's counsel filed the Respondent Tennessee Valley Authority's Notice of New Authority and attached a copy of *United States v. Llera Plaza*, 2002 WL 389163 (E.D. Pa Mar. 13, 2002), in which Judge Pollak reconsidered and reversed his January 7, 2003 Decision. TVA argues that all testimony presented by handwriting experts should be considered.

I find the Respondent's argument compelling. "The fact that the document examination process [regarding definitive determinations of authorship] has not been completely standardized is not necessarily a bar to admissibility in court. Not all expert testimony must be backed up by a standard procedure." *United States v. Prime*, 220 F.Supp. 2d 1203, 1215 (W.D. Wash 2002). "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but permissible evidence." *Daubert v. Merrell Dow Pharms.,* 509 U.S. 579, 596, 113 S.CT. 2786, 125 L.Ed. 2d 469 (1993). Blanket exclusion is not favored, as any questions concerning reliability should be directed to weight given to testimony, not its admissibility. *Clarke v. LR Sys.*, 219 F.Supp. 2d 323, 333 (E.D.N.Y. 2002).

After review of the foregoing, all expert handwriting testimony will be considered. This finding provides little impact on the merits, however, as none of the five document examiners reached a definitive identification or exclusion of Overall or any employee of TVA as the author of any of the questioned writings. The most common theme among the testimony and reports of the experts is that the handwriting analysis is inconclusive due to disguised handwriting and the lack of a sufficient number of individual characters in the writings. Based upon a thorough review of the testimony and reports produced by the experts, I find that the document and typewriter evidence is inconclusive and does not show that Overall or a TVA employee or a TVA supervisor authored the harassing notes on record.

IV. BURDEN OF PROOF AND PRODUCTION

A claim brought under the ERA is subject to the following burdens of proof and production: (1) The complainant must establish a *prima facie* case of discrimination. *DeFord v. Secretary of Labor,* 702 F.2d 281 (1983); (2) Once the complainant establishes a *prima facie* case, then the burden shifts to the respondent to articulate a legitimate, nondiscriminatory reason for its actions against the complainant. *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 249 (1981); (3) The complainant must then demonstrate, by a preponderance of the evidence, that the articulated reason for the adverse employment action was a pretext for discrimination. *Burdine,* 450 U.S. at 249, 257; *Zinn v. University of Missouri,* Case No. 93-ERA-34 and 36 (Sec'y Jan. 18, 1996).

A complainant may demonstrate that the respondent's articulated reasons constitute a pretext for discriminatory treatment by showing: (1) that discrimination was more likely the motivating factor; or, (2) that the proffered explanation was not worthy of credence. 42 U.S.C. §§ 5851 (b)(3)(c); *Zinn,* Case No. 93-ERA-34 and 36, slip op. at 5; *Yellow Freight Systems v. Reich,* 27 F.3d 1133, 1139 (6th Cir. 1994). A finding that the respondent's asserted reasons are pretextual does not compel a finding in favor of the complainant. The complainant still retains the ultimate burden of proving, by a preponderance of the evidence, that the adverse action was taken in retaliation for the complainant's protected activity. *St. Mary's Honor Center v. Hicks,* 509 U.S. 499, 511 (1993). "It is not enough … to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." *Zinn*, 93-ERA-34, at 5 (quoting *St. Mary's Honor Ctr.*, 509 U.S. at 519).

If there is evidence that the respondent was motivated by both legitimate and prohibited reasons, then a dual motive analysis is necessary. *Mt. Healthy Sch. Dist. v. Doyle,* 429 U.S. 274 (1977); *Dysert v. Florida Power Corp.,* Case No. 93-ERA-21 (Sec'y Aug. 7, 1995). Under such an analysis, the employer must show by clear and convincing evidence that it would have taken the adverse action any way. *See, e.g., Zinn,* 93-ERA-34 and 36, at 4.

V. DISCUSSION

Prima Facie Case of Discrimination

The Environmental Acts forbid an employer from discriminating against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment, because the employee engaged in protected activities. *Berkman v. U.S. Coast Guard Academy,* ARB No. 98-056, ALJ No. 1997-CAA-2 and 9 (ARB Feb. 29, 2000), slip op. at 16.

Specifically, the employee protection provision of Section 211 of the Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851(a), provides, in relevant part that:

> a. Discrimination against employee:
>
> 1. No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee…

> A. notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. § 2011, *et seq.*);
>
> . . .
>
> D. commenced, caused to be commenced, or is about to commence a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter….

42 U.S.C. § 5851(a). 29 C.F.R. § 24.2, which was promulgated by the Department of Labor to implement the ERA, provides, in relevant part, that an employer violates the ERA if it "intimidates, threatens, restrains, coerces, blacklists, discharges, or in any other manner discriminates against any employee because the employee" has engaged in protected activity under the ERA. *See* 29 C.F.R. §§ 24.2(b), 24.2(c)(2001).

The whistleblower protections of the ERA "are intended to promote a working environment in which employees are relatively free from the debilitating threat of employment reprisals for publicly asserting company violations of statutes protecting the environment." *Trimmer v. U.S. Dep't. of Labor*, 174 F.3d 1098, 1104 (10th Cir. 1999); *accord. American Nuclear Res. v. U.S. Dep't. of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998) (the ERA "is designed to protect workers who report safety concerns and to encourage nuclear safety generally").

1. Tangible Job Detriment

Discrimination under the Environmental Acts may take the form of a tangible job detriment, such as dismissal, failure to hire, demotion, and the like. *Berkman*, ARB No. 98-056, *citing Varnadore v. Oak Ridge National Laboratory,* Case Nos. 92-CAA-2, *et al.*, Sec. Dec. and Ord., Feb. 5, 1996, slip op. at 92 n. 93 (*Varnadore I*), *aff'd sub nom. Varnadore v. Secretary of Labor*, 141 F.3d 625 (6th Cir. 1998).

Overall asserts that he was subject to specific job detriments in that he was purposely not given a comparable position at TVA or work appropriate to his position as required by Judge Kennington's Order[10] (*See* Complainant's Post-Hearing

[10] *See* Judge Kennington's Order, RDO at 36; CX 17 at CCO 00036.

Findings of Fact and Conclusions of Law, p. 33), that he was excluded from key meetings (*Id.* at pp. 37-38) and that his security clearance was improperly revoked (*Id.* at p. 87).

a. Comparable Position/Meaningful Work

On April 3, 1998, Judge Kennington issued a Recommended Decision and Order which ordered TVA to reinstate Overall to his former position of Power Plant Maintenance Specialist (SD-4) at Watts Bar or, if that position was no longer available, to a substantially equivalent position (FoF ¶ 43).

Overall asserts that upon his return to Watts Bar, he "was told that Mr. Smith would be his supervisor, but there was no discussion about Mr. Overall returning to his former position, which was held by Mr. Jordan" (Complainant's Post-Hearing Brief, p. 34, ¶ 63).

As Watts Bar moved from construction to start up in 1995, Overall's original position was eliminated (FoF ¶ 20, 28). Overall was a Power Plant Maintenance Specialist (FoF ¶ 16), a position primarily related with the planning and start up of Watts Bar (FoF ¶ 16). Jordan transferred to Watts Bar as a Systems Engineer (FoF ¶ 31), an ongoing operational position with different responsibilities. Thus, Jordan did not occupy Overall's former position.

Second, by letter dated May 20, 1998, Higginbotham informed Overall that he would be "reinstated to your former position of Power Plant Maintenance Specialist, SD-4," (FoF ¶ 69), and attached to that letter was the SD-4 job description for Overall's position prior to his termination from Watts Bar (FoF ¶ 69). Overall was told, therefore, that he was to be returned to his previous position at Watts Bar.

Upon return to work, Overall argues that he "received only a few make-work assignments while at Watts Bar in August and September 1998" (Complainant's Post-Hearing Brief, p. 37). Janice Overall stated that Overall "wasn't being given the responsibilities that he had had before, to be able to use his skills and expertise…." (*Id.* at p. 39).

Overall returned to work on August 5, 1998 (FoF ¶ 72), and left work again less than one month later on September 4, 1998 (FoF ¶ 79). During this period, Overall took administrative or annual leave on at least eight occasions (FoF ¶ 79). Overall was actually on-site working for only approximately twelve days during this thirty-day period (FoF ¶ 79).

During their first meeting, Smith told Overall that "there is going to be some training that [Overall] had to go through to get up to speed on procedure changes and [to] be able to do the work" (FoF ¶ 76). Part of that training included upgrading Overall's skills to obtain a qualification card which would allow him to work on PERs unsupervised (*Id.*). A qualification card is earned by familiarizing oneself with all the procedures necessary to complete a given task and by taking a practical factors examination (*Id.*). Given that Overall had been gone from Watts Bar for nearly three years, he lacked a current qualification card (*Id.*). Smith, therefore, could not assign Overall any unsupervised tasks on open PERs until he completed the necessary, updated training (*Id.*). Overall did not complete this training during his one-month reinstatement (FoF ¶ 76).

From August 5 through August 12, Overall was engaged in General Employment Training and Nuclear RAD worker training (FoF ¶ 74). Overall's actual "meaningful" work time, therefore, was effectively constrained to the days that he did not take leave during the period of August 13 through September 4, 1998.

During this period of approximately three weeks, both Smith and Jordan were away from Watts Bar for different periods of time. Jordan and Overall were on-site together at Watts Bar for only three days during Overall's reinstatement (FoF ¶ 75). Smith, Overall's first level supervisor, told Overall that he was "to work with Gary Jordan and get up to speed on the ice condenser system" (FoF ¶ 73). Jordan subsequently assigned Overall responsibility for writing several purchase requisitions, and Overall accompanied Jordan into the ice condenser system to take several required readings (FoF ¶ 78).

TVA is not required to change pre-existing assignments to accommodate Overall's work preferences. The law recognizes that it is the employer, not the employee, who "decides which of several qualified employees will work on a particular assignment." *Mungin v. Katten Muchin & Zavis*, 116 F.3d 1549, 1556 (D.C. Cir. 1997). The fact remains that upon his return to Watts Bar, Overall was not yet qualified to do several independent projects, such as unsupervised work on PERs. Further, as a "new" employee, Overall's assignments would necessarily be limited by projects that had already been assigned to other employees and by the gap in training and procedural changes produced by his three-year absence.

Overall was returned to his previous position and he was assigned work during his brief return to work. Overall's failure to complete the necessary training required for unsupervised work on PERs, coupled with Smith's and Jordan's

absences from Watts Bar during those three weeks, prohibited TVA from assigning any more complicated work to Overall. TVA assigned the types of unsupervised work that could be delegated to Overall given his current training level. I find that Overall was given work appropriate to his position and current level of training.

b. Exclusion from Key Meetings and Communications

"Ostracism by one's co-workers and behavior designed to make a worker feel unwelcome can reach the level where it constitutes adverse action." *Agosto v. Consolidated Edison Co. of N.Y. Inc.*, ALJ Case No. 96-ERA-2, at 17 (ALJ Oct. 14, 1997). Overall asserts that "Jordan, Smith, and others in his work group had frequent conversations and meetings about the ice condenser system, but they never asked Mr. Overall to participate" (Complainant's Post-Hearing Brief, p. 37).

On August 26, 1998, Jordan told Smith that Overall expressed concerns that he was being excluded from meetings (FoF ¶ 156). Smith called Higginbotham and stated that he was concerned that Overall was having issues with the ice condenser and not talking to Smith about them (*Id.*). Smith reported to Higginbotham that he had received a fax from Jordan regarding an Ann Harris speech, wherein Harris was discussing problems that Overall had with the ice condenser system (*Id.*). On September 1, 1998, Overall informed Higginbotham that he was concerned because he was not asked to attend meetings about the ice condenser (FoF ¶ 161). Overall told Higginbotham that he had already spoken to Wiggall and Smith about his concerns (*Id.*).

During Higginbotham's subsequent discussion with Wiggall, Wiggall told Higginbotham that Overall "wasn't going to be involved in every issue associated with the ice condenser" (FoF ¶ 160), and he then later told Overall directly "that we weren't trying to exclude him from issues…." (*Id.*).

As Overall was on-site working for only approximately 12 days, he could only have missed meetings during those days. Overall spent from August 5th through August 12th in new employee training (FoF ¶ 74), and he presumably would not have been available for meetings during that re-orientation period. Smith and Jordan were also off-site for several days during Overall's brief reinstatement, further limiting the possible days that Overall could have been invited to or excluded from a meeting. As Overall had not completed the training required to work on PERs without supervision (FoF ¶ 76), and as most open PERs were already assigned to other departments or employees (FoF ¶ 77),

Overall would not likely have been prepared to meaningfully participate in those discussions.

Overall was invited by Smith to attend an ice condenser symposium from August 18-20, 1998, in Chattanooga, Tennessee, but he chose not to attend on the advice of his attorney (FoF ¶ 159).

Overall cites by example an August 1998 discussion that Jordan had at his work station with Smith, Wiggall, and back-up engineer Paul Law, in which Jordan showed photographs of debris found in the ice condenser unit system at D.C. Cook (FoF ¶ 157). Jordan also allegedly discussed his recent trip to D.C. Cook where he studied their problems in order to address them at Watts Bar (*Id.*). While Overall was not involved in this discussion, Jordan, in a later discussion, showed Overall the photographs at issue, and the photographs in question were always available to any employee via a posting on the common drive of the company's computer system (*Id.*).

Jordan and Smith both testified that they did not convene meetings with everyone in the NSSS group to discuss specific issues, nor did Jordan even invite his back-up engineer to every meeting (FoF ¶ 163). Smith normally would discuss any topic needing to be addressed with Jordan, and if Jordan felt that someone else's presence was necessary to work on that topic, Jordan would request their input or presence to discuss the issue (*Id.*). Jordan testified that whoever attends a particular meeting depends on "what the meeting's about, [and] who it needs to involve" to address the topic at issue (*Id.*).

The one meeting that Overall was specifically invited to, the ice condenser symposium, he chose not to attend. Given Overall's limited time on-site, his failure to complete the training required to update his qualification card (which would have allowed Overall access to more problems and issues associated with open PERS), and given the fact that Smith and Jordan were off-site during much of the time that Overall was reinstated, I find no evidence that Overall was excluded from meetings appropriate to his current level of training and re-orientation to Watts Bar.

Overall asserts that he was excluded from at least one telephone conference with the NRC resident inspector (Complainant's Post-Hearing Brief, p. 38). Overall fails, however, to state the date of this conference, the topics discussed, other attendees, or the appropriateness of his participation in this alleged conference. As such, I afford this complaint little probative weight.

Overall alleges that e-mails concerning ice condenser issues were forwarded to other employees, but that he was not on the distribution list (Complainant's Post-Hearing Brief, p. 38). Specifically, Overall was concerned that he was not being included in information provided from the ice condenser utility group, the group that he had helped start (FoF ¶ 158). Smith and Jordan were current members of the owner's group, but lower level employees, such as the back-up engineer and Overall, were not members (*Id.*). Smith routinely forwarded relevant e-mail messages to Jordan for further inquiry, and Jordan would then forward the e-mail to an appropriate person who could help address the topic at issue (*Id.*). Overall was not on the electronic distribution list, so he also did not receive the more general messages that sometimes were distributed to the entire group (*Id.*). When Overall discussed his communication frustrations with Higginbotham, he was told that the NSSS was a longstanding group to which Overall was a recent addition, and that with time, Overall would become more involved in the organization (*Id.*).

I find no adverse activity on the part of TVA. Given Overall's recent reinstatement to TVA, it was unreasonable for him to assume that he would immediately be reinstated to a group that even the back-up engineer was not a part of. As Overall had been reinstated for less than 30 days, I find it reasonable that the general electronic e-mail distribution list had not yet been updated to include his name and email address. As Overall had not yet completed the qualification card training required to work independently on PERs, I find it reasonable that Smith and Jordan would not send issue-specific e-mails to Overall regarding areas that he was not yet certified to work in. When Overall discussed his concerns with Higginbotham, he was assured that with time, Overall would become more involved in the organization. Overall did not stay at work long enough to see if Higginbotham would make good on his assurance.

c. Security Clearance

Overall alleges that his security clearance was improperly revoked in retaliation for his participation in protected activities (Complainant's Post-Hearing Brief, p. 87). Specifically, Overall received a September 30, 1998 letter from Ron Casey, Manager of TVA Corporate Nuclear Security, which temporarily suspended his security clearance (FoF ¶ 164). Overall argues that only after he filed a third DOL complaint (FoF ¶¶ 59-61) did TVA relent and reinstate his security clearance.

Unlike the previous arguments regarding appropriate work assignments and departmental communications, the revocation of Overall's security clearance by TVA caused a legitimate job detriment by changing the conditions of Overall's employment. Such a change in conditions establishes a *prima facie* case of discrimination demonstrated through adverse employment action. *See DeFord, supra*. Once the complainant establishes a *prima facie* case of discrimination, the burden then shifts to the respondent to articulate a legitimate nondiscriminatory reason for its actions against the complainant. *See Burdine, supra*.

TVA has proffered a nondiscriminatory reason for revoking Overall's security clearance. TVA received two letters from Overall's psychologist, Dr. G. Gary Leigh, discussing Overall's ability to return to work (FoF ¶ 164). Dr. Leigh discussed psychological problems that Overall was experiencing, including occasional suicidal ideation and other stress-related symptoms (*Id.*). Dr. Leigh advised that it would be clinically unwise for Overall to return to work at Watts Bar or any other TVA site due to the debilitating effects on his psychological state of mind (*Id.*). Dr. Leigh further stated that given Overall's emotional state, he doubted that Overall could pass a fitness for duty evaluation to return to work (*Id*).

This opinion was reviewed by Dr. Lavin, TVA's psychologist, who recommended suspension of Overall's security clearance based on the opinion of Dr. Leigh (FoF ¶ 164). Given Overall's unstable emotional state and his occasional suicidal ideations, it was logical for TVA to restrict Overall, who (through his engineering knowledge and through his position as a Maintenance Specialist) could do harm not only to himself, but also potentially to other employees and to the public at large through emotionally induced carelessness or possibly even sabotage at a nuclear power plant. I find that such a restriction and revocation of unescorted security clearance is based on personal, employee, and public safety concerns, and not upon retaliation for protected activity. TVA has met its burden.

The complainant must then demonstrate, by a preponderance of the evidence, that the articulated nondiscriminatory reason was merely a pretext for discrimination. *See Burdine, supra*. Here, Overall's argument fails. Overall argues that TVA's security clearance revocation was part of an ongoing scheme of harassment and that "only after [filing a third DOL] complaint did TVA reinstate ... Overall's unescorted security clearance…." (Complainant's Post-Hearing Brief, p. 87). The facts do not support such an argument.

Overall met with TVAN psychologist Dr. Patrick Lavin in May 1999 to re-evaluate Overall's condition (FoF ¶ 165). Dr. Lavin contacted Dr. Leigh and requested a current diagnosis, prognosis, opinion, and recommendation concerning Overall (*Id.*). On May 27, 1999, Dr. Leigh responded that Overall suffered from depression and opined that:

> He has recently achieved a re-stabilization of his symptoms, but I would anticipate that if he returns to his previous work site that he would re-experience the primary symptoms of anxiety, hypervigilance, moodiness, probably anxiety attacks and possible panic attacks, sleep disturbance and re-emergence of somatic correlates of anxiety. I initially thought that if he was placed in a job site remote from his previous one that he might be able to perform duties in an emotionally stable manner, but now I am not sure and I cannot provide you with any assurance that he can. His emotional stability and behavioral reliability is now unpredictable and vulnerable to disruption (*Id.*).

Kevin R. Ferguson, M.D., Overall's psychiatrist, defined hypervigilance as "being like overly cautious or aware of your situation, looking around, being on guard and not being able to relax because of the need to keep your awareness up" (FoF ¶ 166).

Three months later, on August 30, 1999, Dr. Lavin sent a follow-up letter requesting an updated diagnosis and opinion from Dr. Leigh and Dr. Ferguson (FoF ¶ 167). On August 31, Dr. Ferguson responded and opined that "if Mr. Overall were to return to work at TVA at this time, his feelings of depression and paranoia will intensify significantly, and he will not be able to function on the job-site in an emotionally stable manner" (*Id.*).

On October 12, 1999, Ron Casey informed Overall that his unescorted security clearance had been denied (FoF ¶ 168). This decision was based on Dr. Lavin's opinion that Overall showed "psychological characteristics that could adversely impact emotional stability and impact behavioral reliability in the workplace" (*Id.*). Dr. Leigh and Dr. Ferguson stated their opinions that Overall "will not be able to function on the job site in an emotionally stable manner" (*Id.*).

In response to this denial, Overall filed his third DOL complaint (FoF ¶ 59). On October 12, 1999, Overall's counsel asked Dr. Leigh to clarify his opinion (FoF ¶ 169). Dr. Leigh clarified his opinion, stating that Overall did not pose a

danger to others, only potentially to himself (*Id.*). Based on the clarified opinion of Dr. Leigh that Overall was no longer a threat to others (which was not available at the time of the October 12, 1999 denial), Casey informed Overall via a December 6, 1999 letter that his security clearance was being reinstated (FoF ¶ 170).

Contrary to Overall's argument, TVA reinstated his security clearance not due to Overall's filing of his third DOL complaint, but rather upon confirmation that he was no longer a threat to safety at the nuclear plant (FoF ¶ 170). Overall has failed to demonstrate by a preponderance of the evidence that TVA's revocation, based upon work place and public safety concerns and in light of Dr. Leigh's assessment of Overall's emotional instability, was a pretext for discrimination.

While Overall argues that his unstable emotional state was caused in fact by TVA's ongoing retaliation and harassment, the proper question at this stage is whether the security clearance suspension itself was in retaliation for Overall's engagement in protected activities. Overall's emotional instability is relevant at this stage only in providing TVA with a legitimate nondiscriminatory reason for suspending his clearance. Overall's emotional state of mind will be relevant when discussing whether TVA subjected Overall to a hostile work environment.

Overall has failed to prove discrimination through harassment or retaliation evidenced by an adverse employment action or a tangible job detriment.

2. Hostile Work Environment

In addition to the alleged direct adverse employment actions taken by TVA, Overall alleges that discrimination against him took the form of a hostile work environment perpetuated by TVA's failure to prevent harassment outside of the work place and by TVA's failure to adequately investigate alleged incidents of harassment which occurred following Judge Kennington's Decision and Overall's return to Watts Bar Nuclear Facility.

The whistleblower protections of the ERA not only prohibit retaliatory personnel actions, but they also prohibit retaliatory harassment, including a hostile work environment. *See, e.g., English v. Whitfield*, 858, F.2d 957, 964 (4th Cir. 1988); *Varnadore v. Oak Ridge Nat'l Lab.*, No. 92, CAA-2, at 49-50 (Sec'y Jan. 26, 1996). The concept of a hostile work environment, which was first developed in the context of race

and sex-based employment discrimination, applies to whistleblower cases. *Berkman v. U.S. Coast Guard Academy*, slip op. at 16, *citing Varnadore v. Oak Ridge National Laboratory*, Case Nos. 92-CAA-2, *et al.*, ARB Final Consolidated Dec. and Ord., June 14, 1996, slip op. at 71 (*Varnadore II), aff'd Varnadore*, 141 F.3d at 625. Under the ERA, discrimination may take the form of harassment that is "sufficiently severe or pervasive as to alter the conditions of employment and create an abusive or hostile work environment." *Smith v. Esicorp, Inc.*, Case No. 93-ERA-16, Sec'y Dec. and Ord. of Rem., Mar. 13, 1996, slip op. at 23-24.

An employer may be held liable for a hostile work environment in two situations: (1) vicariously because of the actions of a supervisor directed against an employee; or, (2) directly for the employer's failing to take prompt and reasonable corrective actions to remedy the harassment. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) ("[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.").

"The employer's liability in cases of co-worker harassment is direct, not derivative; the employer is being held directly responsible for its own acts or omissions …." *Blankenship v. Parke Care Ctr., Inc.*, 123 F.3d 868, 873 (6th Cir. 1997). "The act of discrimination by the employer in such a case is not the harassment, but rather the inappropriate response to the charges of harassment." (*Id.*). A Court must judge the appropriateness of a response by the frequency and severity of the alleged harassment. *See Eribia v. Chrysler Plastic Prods. Corp.*, 772 F.2d 1250, 1252-1253 (6th Cir. 1985). Generally, a response is adequate if it is reasonably calculated to end the harassment. *Jackson v. Quanex Corp.*, 191 F.3d 647, 663 (6th Cir. 1999).

a. Vicarious Liability

To establish a *prima facie* case of vicarious employer liability through hostile work environment, the complainant must demonstrate:

i. The employee engaged in protected activity and suffered intentional retaliation as a result;

ii. The retaliation was pervasive and regular;

iii. The retaliation detrimentally affected the employee;

iv. The retaliation would have detrimentally affected other reasonable whistleblowers in that position; and,

v. The existence of *respondeat superior* liability.

Varnadore v. Oak Ridge Nat'l Lab., No. 92-CAA-2, at 49 (Sec'y Jan. 26, 1996), *citing West v. Philadelphia Elec. Co.*, 45 F.3d 744 (3d Cir. 1995).

In *Jackson v. Quanex Corp.*, 191 F.3d 647, 659 (6th Cir. 1999), the Sixth Circuit held that the "totality of the circumstances" should be considered in a hostile work environment claim, and that the issue to be considered is whether, taken together, the reported incidents of harassment make out such a claim. *Jackson,* 191 F.3d at 659. The factfinder should not examine each incident of harassment in a vacuum, because what may appear to be a legitimate justification for a single incident may look pretextual when viewed in the context of several other related incidents. *See Andrews v. City of Philadelphia,* 895 F.2d 1469, 1484 (3rd Cir. 1990). Utilizing the standard set forth in *Jackson*, I review the totality of the circumstances for each element of the *prima facie* case.

i. Protected Activity and Intentional Retaliation

As discussed in detail above, Overall engaged in protected activity (FoF ¶¶ 34-61). The question remaining in the first element is whether Overall suffered intentional retaliation as a result of engaging in protected activity.

1. Incidents that are neither Retaliation nor Harassment

There are several off-site incidents near Overall's home which have not been proven to be retaliation or harassment in any form. Specifically, these events include:

a. The May 28, 1998 Incident Involving the Gray BMW or Mercedes

On May 28, 1998, Overall's wife, Janice Overall, observed a "gray BMW or Mercedes" driving slowly through the Overall neighborhood (FoF ¶ 84). She testified that she viewed this to

be an incident of harassment because they "just don't have that kind of car driving through [the Overall] neighborhood with that kind of a person in the car" (*Id.*).

There is no evidence indicating that the car in question was driven through the Overall neighborhood in an attempt to harass or retaliate against Overall because he filed a whistleblower complaint or engaged in any other protected activity. There is no indication that this event was ever repeated, and the Overall's did not obtain a license plate number of the vehicle which could have allowed further investigation of the vehicle or its driver (FoF ¶ 85).

b. The May 29, 1998 Suspicious Car

On May 29, 1998, at approximately two o'clock in the morning, Overall heard dogs barking outside, and he saw a car with its headlights turned off, driving away from his home (FoF ¶ 86).

There is no evidence that the car was ever actually at, or parked in front of, the Overall residence or that the driver drove away from the Overall residence as a form of retaliation to Overall's protected activity. There was no damage done to Overall's residence or vehicles, and there were no "notes" left on the Overall's car or front door as happened in later incidents.

c. The June 1, 1998 Gas Cap Incident

On the evening of June 1, 1998, Overall's son, Joseph, discovered that the gas tank door on Overall's truck was open, and the gas cap had been removed (FoF ¶ 91). There is no evidence linking this incident to any of Overall's protected activities. There was nothing added to Overall's gas tank nor was any damage done to the vehicle. The lack of damage coupled with the lack of connection to Overall's protected activities or a retaliatory motive makes any correlation of this event to a hostile work environment too tenuous to maintain.

d. The June 13, 1998 Popping Noise/Motion Detector Activated

On the evening of June 13, 1998, Janice Overall heard a "popping" noise outside the Overall home (FoF ¶ 96). Overall went outside to investigate, and he noticed that the gas tank door on his truck was open (*Id.)*. Overall saw someone crouching under a tree in his neighbor's front yard, who then ran away (*Id.)*.

The record of this incident shows an open gas tank door with no damage done to the truck, no foreign substance added to the gas tank, no identifiable person responsible, and no connection between the open gas door and Overall's protected activities.

e. The June 16, 1998 Laughing/Breathing Telephone Call

Overall's daughter, Amanda, answered a telephone call at the Overall residence on June 16, 1998, which consisted of "perverted laughing and heavy breathing" (FoF ¶ 98).

There is no evidence that this phone call was anything other than a "prank" phone call. Subsequent investigation traced the source of the phone call to a pay telephone near the Overall's residence (FoF ¶ 99). There is no evidence suggesting retaliatory intent, nor is there evidence linking this incident to Overall's whistleblowing activities.

f. The June 17, 1998 'Harassing' Buick Riviera

On June 17, 1998, Overall and his daughter were driving through the Overall neighborhood when they passed a driver in a Buick Riviera or Regal driving down the opposite side of the street (FoF ¶ 100). Overall and the other driver each motioned for the other to pull ahead, and the other driver "gave [Overall] a real good stare and kind of grinned, silly at us" (*Id.*).

Subsequent investigation identified the owner of the vehicle as a Tennessee State Trooper who owned rental property near the Overall's neighborhood (FoF ¶ 102). His drive through the neighborhood had no retaliatory overtones, and the Trooper did not remember the incident (*Id.*). This incident has not been proven to be in retaliation nor has the incident been linked to Overall's protected activities.

g. The August 5, 1998 Ninja Motorcycle

On the evening of August 5, 1998, as Overall drove home from work, he was followed by someone riding a Ninja motorcycle, who passed him "[a]ggressively, and then went on" (FoF ¶ 105). Overall did not provide the license plate number of the motorcycle to allow further investigation (*Id.*). There is no evidence suggesting that this event was retaliatory in nature, nor is there evidence linking this event to Overall's whistleblowing activities.

h. The August 25, 1998 Blue Pick-Up Truck

As he drove home from work on the evening of August 25, 1998, Overall was followed by a driver in a blue pick-up truck, who flashed its lights and blew its horn (FoF ¶ 106). The truck repeatedly followed Overall's vehicle extremely closely and then backed off (*Id.*). Overall was concerned that the truck was going to run him off the road (*Id.*). When Overall turned off onto his road, the driver continued going straight and blew its horn (*Id.*).

While the alleged behavior cited by Overall could be considered harassing and potentially threatening, there is no evidence connecting the pick-up and/or its driver's behavior to Overall's protected activity. While Overall reported the incident to Smith and Higginbotham at TVA (FoF ¶ 107), he did not obtain a license plate number which would have allowed further investigation, nor did he file a police report concerning the incident (*Id.*). As such, while the incident was potentially threatening, I do not find that it was intended as retaliation or harassment in response to Overall's protected activities.

i. The September 2, 1998 Telephone Call

On the evening of September 2, 1998, Overall's daughter, Amanda, answered a telephone call at the Overall residence, in which the caller asked for Overall, but then refused to identify himself and hung up (FoF ¶ 109). While other "harassing" phone calls were traced via the Overall's caller-ID system, there is no record that this number was forwarded to Overall's attorney or to TVA OIG. There is no evidence suggesting that the phone call was retaliatory in nature, nor is there evidence linking the call to Overall's whistleblowing activities.

j. The September 9, 1998 S-10 Truck

While waiting for the police to arrive at the Office Max store to investigate the "fake bomb" (FoF ¶¶ 112-125), Janice Overall and Overall's daughter, Amanda, drove to the Office Max store to be with Overall (FoF ¶ 127). As Janice and Amanda Overall left the Overall residence, a person driving an S-10 pick-up truck drove slowly past the Overall home and stared at Overall's daughter, Amanda (*Id.*). As Amanda returned home with her older brother, she again saw the suspicious white truck being driven in the neighborhood (FoF ¶ 128). Amanda recorded the license number of the truck and wrote down a brief description of the driver (*Id.*).

There is no evidence linking this incident to retaliation or to Overall's activities as a whistleblower. Subsequent investigation by TVA showed that the truck was registered to a Peter Langdon, who has no known ties to TVA (FoF ¶ 130). Langdon testified that he was in Overall's neighborhood making a service call to a customer of the alarm company for which he was employed (FoF ¶ 138).

k. The September 17, 1998 Note

On September 17, 1998, Overall discovered an anonymous note on a fence close to his home which read, "Curtis watch your backside you are being set up. Be carefull [sic]. Here are more screw [sic] found last outage. Your friend" (FoF ¶ 132). The note was written on TVA Daily Journal stationery, and ice condenser screws were attached to the note (*Id.*).

Based on the language of the note, it appears that the author is a "friend" and is trying to aid Overall. Although the note was written on TVA stationery and addressed Overall by his first name (Curtis), there is no evidence that this note was left in retaliation or was intended as harassment in response to Overall's protected activity. As such, it does not support a *prima facie* case of hostile work environment.

These eleven incidents 1) were anonymous in nature; 2) have not been connected to any of Overall's protected activity; and 3) have not been proven to have been harassing events directed at Overall and/or his family in retaliation for his protected activity. The record establishes only that these random events occurred in the same relevant time period as other alleged harassing events in the Overall's lives. As such, they carry no probative value towards establishment of a hostile work environment, and I will not consider them further.

2. Off-site Incidents of Possible Harassment and/or Retaliation

There were several events that occurred away from the Watts Bar work site that require further scrutiny. The anonymous nature of many of these incidents is not relevant at this point. "The totality of the circumstances … includes all incidents of alleged harassment; as such, … courts must not conduct separate analyses based on the identity of the harasser unless and until considering employer liability." *Williams v. General Motors Corporation*, 187 F.3d 553, 562-563 (6th Cir. 1999). Incidents of harassment that occur at the employee's home as opposed to the work place may be considered in the totality of the circumstances. *See, e.g., Ward v. City of Streetsboro,* 1996 WL 346812 *1 (6th Cir. 1996) (holding that a dead rat found in the employee's residential mail box and numerous harassing calls made to the employee's home telephone number were appropriately considered in establishing a *prima facie* case of hostile work environment).

a. The May 25, 1998 Telephone Call

Subsequent to Judge Kennington's Decision and while Overall awaited his return to Watts Bar, he accepted an invitation to speak about his whistleblowing activities at a press conference to be held on May 26, 1998 at the National Press Club in Washington, D.C. (FoF ¶ 47).

On May 23, 1998, *The Atlanta Constitution* published an article discussing Overall's whistleblowing activities and announcing that he would be speaking at the press conference (FoF ¶ 48). On the evening of May 25, 1998, the night before the press conference, Overall received a phone call that consisted of a caller repeatedly blowing a whistle (FoF ¶ 80).

Both the timing of this phone call (on the eve of the National press conference) and the nature of the call (continuous whistling) suggest an intentional harassment of Overall for his engagement in protected activities.

b. The May 29, 1998 "SILKWOOD" Note

On the morning of May 29, 1998, Janice Overall discovered a note under the passenger side wiper blade of Overall's pickup truck, which read "Silkwood" (FoF ¶ 87). Overall stated that he felt the note was "a warning" and "a threat note" or "a death threat," because he interpreted the note as referring to Karen Silkwood, a whistleblower who died under mysterious circumstances (FoF ¶ 88).

It can be inferred that this note was left in retaliation for Overall's protected activity, as both he and Karen Silkwood were whistleblowers. As Silkwood died in unusual circumstances, it can be inferred that the note suggested what could happen to Overall if he continued his protected activities. I find that the "SILKWOOD" note demonstrates an intentional act of retaliation against Overall and harassment of Overall for engaging in protected activities.

c. The June 9, 1998 "BOO" Note

On the morning of June 9, 1998, Janice Overall discovered a hand-printed note which read "BOO!" taped to the front door of the Overall residence (FoF ¶ 92).

The "BOO" note, which followed a more potentially sinister "SILKWOOD" note, can be construed to have been left to further frighten Overall in retaliation for his engagement in protected activities. Given the placement of the note (on Overall's front door) and the timing of the note (only 11 days after the "SILKWOOD" note), I find that this note was intentional, retaliatory in nature, and in response to Overall's engagement in protected activities.

d. The June 11, 1998 "STOP IT NOW" Note

On June 11, 1998, Overall returned to his truck after shopping at a local Wal-Mart and found a note which read "STOP IT NOW" on the windshield of his truck (FoF ¶ 94).

Given the timing of the note (just two days after the "BOO" note), the placement of the note (again on the windshield of Overall's vehicle), the location of Overall's truck at the time the note was delivered (at a local store, suggesting that someone knew where Overall was going), and the actual statement made, I find that this note was intended to harass Overall for his engagement in protected activities.

e. The June 26, 1998 Whistle Telephone Call

On June 26, 1998, Amanda Overall answered a telephone call at the Overall residence which consisted of a whistle being repeatedly blown (FoF ¶ 103). Subsequent investigation showed that this phone call was placed from a local pay phone near the Overall's residence (FoF ¶ 104).

Unlike the nonspecific intent of the laughing and breathing telephone call of June 16, 1998 (FoF ¶ 98-99), this continuous whistle call can be inferred to be in direct response to Overall's status as a whistleblower. As such, I find that this telephone call was intended as retaliation for Overall's engagement in protected activities.

f. The September 6, 1998 Note

On September 6, 1998, Overall discovered a note under the driver's side windshield wiper of the Overall family car which was parked outside the Overall residence (FoF ¶ 110). The note read, "Did you get the message yet?" (*Id.*).

Given the proximity in time to the prior notes and telephone calls and the placement of the note on the Overall's windshield (now the third time a harassing note had been placed there), it is inferred that "did you get the message yet?" referred to the prior notes and telephone calls and was intended as a continuing form of retaliation and harassment for Overall's engagement in protected activities.

g. The September 9, 1998 Fake Bomb

On September 9, 1998, Overall went to an Office Max store to make copies (FoF ¶ 112). Upon returning to his truck, he discovered a "black object about a foot long" in the back of his truck (*Id.*). Overall thought that the object "looked like an explosive device" (*Id.*).

The object was subsequently discovered not to be an explosive device (FoF ¶ 125), but it was genuine enough in appearance to invoke a sizable police response along with the bomb squad (FoF ¶ 114). The object was later given to the Bureau of Alcohol, Tobacco, and Firearms for investigation (FoF ¶ 125).

Given the prior history of harassing notes and telephone calls discussed above, the fact that this was the second alleged retaliatory act to occur away from the Overall residence (again suggesting that someone could have been following Overall's movements (*see also*, the June 11, 1998 "stop it now" note, FoF ¶ 94)) and the appearance of the "fake bomb" (genuine enough to invoke summoning the bomb squad), I find that the device placed in Overall's truck was in retaliation for Overall's engagement in protected activities as a whistleblower.

h. The December 21, 2000 Note

On December 21, 2000, Janice Overall opened an envelope mailed to the Overall residence which contained a note that read, "[y]ou need to go" along with a photocopy of Overall's former Watts Bar identification badge (FoF ¶ 133).

The note can be at least superficially linked to Watts Bar through the incorporation of a photocopy of Overall's Watts Bar identification badge. This old Watts Bar identification badge was allegedly mailed back to TVA in February 2000, ten months before it was used in this note (FoF ¶ 134).

Given the nature of the message and the connection to Watts Bar, I infer that the sender of this message intended it as harassment in retaliation to Overall's engagement in protected activities.

3. Watts Bar Incidents of Alleged Harassment

In addition to off-site events, there are several incidents that occurred at the TVA Watts Bar facility.

a. The August 5, 1998 Wiggall Comment

Overall returned to work at Watts Bar on August 5, 1998 (FoF ¶ 72). When he spoke with Wiggall, his second-level supervisor, Wiggall told Overall, "[w]e're here as engineers not to make up problems, but [to] find them and correct them" (FoF ¶ 137). Wiggall then apologized to Overall, and said that he meant to say, "[w]e're here as systems engineers to find problems and fix them" (*Id.*).

Taking note of both Wiggall's original statement and his quick apology (apparently realizing the possible impropriety of his statement), I find that Wiggall's original statement was made in response to Overall's engagement in protected activities.

b. The August, 1998 Dennis Tumlin Comment

While at work, Overall encountered Dennis Tumlin in the boiler-maker shop, who greeted Overall with the phrase, "[t]here's that whistleblower" (FoF ¶ 138). Overall testified that there were approximately 15 people present in the boiler-maker shop when Tumlin made this comment. Tumlin later invited

Overall into the boiler-maker shop and said that he was "just kidding" (*Id.*).

Tumlin's reference to Overall as "that whistleblower" clearly refers to Overall's protected activity. Whether the comment was intended as harassment or as a poor attempt at humor makes little difference in this instance. Simple teasing, offhand comments and isolated incidents do not rise to the level of discriminatory changes in the terms of employment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed. 2d 633 (1998); *Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 793 (6th Cir 2000); *Akers v. Alvey*, 338 F.3d 491, 499 (6th Cir. 2003). Tumlin's comment was mild in nature and was either an isolated incident or teasing. As such, I find Dennis Tumlin's comment was not harassment in response to Overall's protected activity.

c. The August 25, 1998 Adair Response to PER 823 Questions

On August 24, 1998, Smith informed Overall that broken stubs of screws were found in the ice condenser unit at the last inspection (FoF ¶ 140). After learning that Jordan wrote a PER concerning the broken screws, Overall questioned Jordan about the PER on August 24, 1998 (FoF ¶ 141). Jordan referred Overall to Adair (*Id.*). On August 25, 1998, when Overall questioned Adair about the PER, Overall alleges that Adair "responded forcefully and in a hostile manner, wanting to know why [Overall] needed to know [about the PER]" (FoF ¶ 142). As Overall's department had no action items or duties concerning PER 823 (FoF ¶ 139), there was no apparent reason for Overall to request information on this particular item. Smith testified that Adair was only questioning whether Overall "was asking for documents that weren't specifically related to the tasks that [Overall] was assigned to do" (FoF ¶ 142).

Given Smith's explanation and the fact that NSSS had no duties or action items regarding PER 823, I find that Adair's comments were reasonable under the circumstances and that they were not made to harass or retaliate against Overall for his participation in protected activities.

d. The August 27, 1998 Typewritten Note

On August 27, 1998, while at his desk at Watts Bar, Overall received a typewritten note in a TVA interoffice mailer which read, "[l]eave Watts Bar, there is no room for whistleblowers here or else" (FoF ¶ 143).

Given the language of the note and the fact that it was sent via TVA interoffice mail directly to Overall's work area, I find that this note was intended to harass Overall for his past protected activities.

e. The Doug Williams Incident

As Overall left work at Watts Bar on August 27, 1998, he was approached by Doug Williams (FoF ¶ 146). Overall testified that Williams asked to speak with him, at which time he stated that he "had a problem with his name being mentioned in ALJ Kennington's case," where it was noted that Williams did not have a degree and was allowed to remain at Watts Bar, doing the same work that Overall was qualified to perform (*Id.*). Overall advised Williams to speak with Overall's attorney (*Id.*).

Williams' comment directly concerned Overall's prior lawsuit against TVA. William's comments, however, state a "problem" with being named in the earlier decision and do not on their face show an intent to harass or retaliate against Overall. Overall advised Williams to speak with Overall's attorney and the conversation ended there. There was no subsequent inquiry or challenge made by Williams, nor did Williams continue the August 27th conversation beyond the brief exchange made as Overall left the building. I find the nature of the conversation, the words allegedly spoken, and the lack of continuation and/or follow-up by Williams show that this was an inquiry (albeit an unhappy one) and that the exchange was not intended as harassment or retaliation against Overall for his protected activities.

f. The August 29, 1998 Voice Mail

On Sunday, August 30, 1998, while at his home, Overall telephoned his voice mail system at Watts Bar to retrieve any messages that had been left for him (FoF ¶ 148). Overall received a message which consisted of a repeated whistle-blowing sound (*Id.*). The time and date stamp on the voice mail show that it was left at 1:47 p.m. on August 29, 1998 (*Id.*).

Although TVA's telephone system uses a central trunk line which prohibits tracing of the voice mail, the message itself, repeated whistle-blowing, is enough to establish that the caller intended the voice mail to be harassment and retaliation in response to Overall's protected activities.

g. September 3, 1998: Adair Enters Meeting

On September 3, 1998, while Overall was meeting with NRC inspectors, Adair allegedly entered the meeting room unannounced, said "[e]xcuse me," and stood inside the meeting room prompting Overall to end the meeting (FoF ¶ 151). Adair was aware that the NRC inspectors were using that particular room, but he had no recollection of interrupting the meeting (FoF ¶ 152).

Given the innocuous nature of the intrusion and Adair's alleged comments, there is no evidence that if Adair actually entered the room, he did so with a retaliatory purpose. I find that the entrance by Adair was not intended as harassment or retaliation in response to Overall's protected activity of meeting with the NRC.

h. The September 4, 1998 Message on the Bathroom Wall

On September 4, 1998, an employee discovered the message "[g]o home all whistleblowers now" written on a bathroom stall at Watts Bar (FoF ¶ 153). The restroom where the writing was discovered was located on the same floor where Overall worked, but on a different side of the building (FoF ¶ 154). Overall did not personally see the writing on the bathroom wall, but he overheard other employees speaking about the incident (*Id.*).

The message "go home all whistleblowers" could be a sign that it was meant for anyone considering filing a whistleblower complaint, and not just Overall. Given that the message was written on the same floor as Overall worked, I find that the note was intended as harassment and retaliation against Overall in response to his engagement in protected activities.

Having found protected activity above, I find that the following individual events constitute harassment intended to retaliate against Overall for engaging in protected activities:

1. The May 25, 1998 Telephone Call;
2. The May 29, 1998 "SILKWOOD" Note;
3. The June 9, 1998 "BOO" Note;
4. The June 11, 1998 "STOP IT NOW" Note;
5. The June 26, 1998 Whistle Telephone Call;
6. The August 5, 1998 Wiggall Comment;
7. The August 27, 1998 Typewritten Note;
8. The August 29, 1998 Voice Mail Message;
9. The September 4, 1998 Message on the Bathroom Wall;
10. The September 6, 1998 Note;

11. The September 9, 1998 "Fake Bomb;" and,
12. The December 21, 2000 Note.

In reviewing the totality of the alleged harassing events, I find that Overall has established the first element of a hostile work environment *prima facie* case.

ii. Pervasive and Regular Retaliation

To satisfy the second element of a *prima facie* case of hostile work environment, that the retaliation was pervasive and regular, an objective and a subjective test must be met. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). The objective test requires that the conduct be severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive. *Id.* The subjective test requires that the victim regard that environment as abusive. *Id.*

When objectively determining whether the alleged harassment is sufficiently severe or pervasive to constitute a hostile work environment, the totality of the circumstances must be considered. *Williams,* 187 F.3d at 562.

In *Varnadore v. Oak Ridge National Laboratory*, the Administrative Review Board wrote that a workplace constitutes a hostile work environment when it is permeated with "discriminatory intimidation, ridicule, and insult" that is "sufficiently severe or pervasive" to alter the conditions of employment and create an abusive working environment. *Varnadore v. Oak Ridge National Laboratory,* Case Nos. 92-CAA-2, *et al.*, ARB Final Consolidated Dec. and Ord. (June 14, 1996), slip op. at 42 *(Varnadore II*). According to the ARB, the mere utterance of an epithet which engenders offensive feelings in an employee does not sufficiently affect the conditions of employment so as to implicate Title VII. *Id., citing Batts v. NLT Corp.,* 844 F.2d 331 (6th Cir. 1988). Additionally, simple teasing, offhand comments, and isolated incidents (unless extremely serious) do not amount to discriminatory changes in the terms and conditions of employment. *Morris v. Oldham County Fiscal Court,* 201 F.3d 784, 790 (6th Cir. 2000). Factors to consider when determining whether conduct is sufficiently severe or pervasive to create a hostile work environment include:

(1) the frequency of the discriminatory conduct;
(2) the severity of the discriminatory conduct;
(3) whether the discriminatory conduct is physically threatening or humiliating, or a mere offensive utterance; and,

(4) whether the discriminatory conduct unreasonably interferes with an employee's work performance.

Harris v. Forklift Systems, Inc., 510 U.S. 17 at 23.

1. Frequency of the Alleged Harassment

Eleven of the above twelve incidents of alleged harassment and/or retaliation occurred between May 25, 1998 and September 9, 1998. The remaining incident occurred on December 21, 2000. As 11 of the 12 incidents occurred within a period of just 3½ months, I find that they are sufficiently frequent to satisfy this factor.

2. Severity of the Alleged Harassment

The above-listed twelve incidents of alleged harassment involve primarily off-hand comments by co-workers or anonymous notes. The telephone calls of May 25th (FoF ¶ 80) and June 26th (FoF ¶ 103) and the voice mail message of August 29th (FoF ¶ 148) consist of someone blowing a whistle continuously. The anonymous notes of June 9th (FoF ¶ 92), June 11th (FoF ¶ 99), August 27th (FoF ¶ 143), September 4th (FoF ¶ 153), September 6th (FoF ¶ 110), and December 21st (FoF ¶ 133) consist of a few simple words commenting on Overall's status as a whistleblower or expressing desire for Overall to stop his protected activities. The off-hand comment by Wiggall (FoF ¶ 137) was quickly recognized by Wiggall as inappropriate, and he immediately apologized. Of the twelve incidents listed above, the "SILKWOOD" message (FoF ¶ 87), referencing a dead whistleblower, and the fake bomb incident (FoF ¶ 112), suggest severe harassment beyond a simple desire to have Overall stop participating in protected activity. In review of the totality of the circumstances, I find that the two more serious incidents coupled with ten less intimidating incidents leans this factor in favor of severe harassment.

3. Threat of Physical Harm or Humiliation vs. Mere Offensive Utterance

The "SILKWOOD" note and the "Fake Bomb" incident discussed above were sufficiently severe enough to be considered a credible threat of physical harm. Silkwood was a former whistleblower who died under peculiar circumstances, suggesting that the author of the "SILKWOOD" note may have been making a comparison of Silkwood to Overall. It can also be inferred that the fake bomb was intended as a threat of physical harm; if not immediate, then a warning of what could happen in the future

with a real explosive device. I find these two incidents together constitute a threat of physical harm sufficient to sway this factor in Overall's favor.

4. Whether the Incidents of Alleged Harassment Unreasonably Interfered with the Complainant's Work Performance

Overall returned to work at Watts Bar on August 5, 1998 (FoF ¶ 72). He was involved in training from August 5 through August 12 (FoF ¶ 74). From August 12 through September 4, 1998, Overall took some form of leave or was otherwise not working in his department on at least eight occasions in reaction to the various incidents occurring around him (FoF ¶ 79)[11]. Over the course of approximately 24 work days, Overall was absent approximately one-third of the time. I find that the incidents of harassment unreasonably interfered with Overall's work performance by forcing him to take leave to deal with the emotional issues brought on by the ongoing harassing events.

Based upon a review of the four foregoing factors, I find that the incidents of alleged harassment discussed above were severe and pervasive as contemplated by *Varnadore* and *Harris*. Overall has satisfied this element of a hostile work environment claim.

iii. Retaliation Detrimentally Affected the Employee

The third element, whether the retaliation detrimentally affected the employee, requires examination of the Complainant's emotional condition and the relationship of that condition to the alleged acts of retaliation. *See Varnadore,* 92-CAA-2 at 50.

Of the twelve events that are considered to be harassing or retaliatory in nature, Overall had various emotional reactions to each incident.

1. The May 25, 1998 Phone Call

Overall testified that he interpreted the May 25, 1998 phone call as a "kind of warning" that "put me on alert" with regard to participating in the Washington D.C. press conference (FoF ¶ 80).

[11] The days absent from the department include: 1) Aug. 24, 1998, 8 hrs. annual leave; Aug. 26, 1998, 2 hours annual leave; Aug. 27, 1998, 8 hrs. administrative leave; Aug. 28, 1998, 8 hrs. administrative leave; Aug. 31, 1998, administrative leave, Sept. 1-4, 1998, accompanied NRC Inspectors (Smith, TN Tr. at 2757-2762).

2. The May 29, 1998 "SILKWOOD" Note

Overall testified that he and his wife cried and were very upset, angry, and "very emotional" (FoF ¶ 88). Overall stated that he felt the note was "a warning" and "a threat note" or "a death threat," because he interpreted the note as referring to Karen Silkwood, a whistleblower who died in mysterious circumstances (*Id.*).

3. The June 9, 1998 "BOO!" Note

Overall testified that he was "very disturbed … angry … [and] just couldn't believe everything was just mounting up the way it was doing" (FoF ¶ 92). He stated that he had "never had any problems … in the past … [and] didn't have any disgruntled neighbors … [so] "it had to have been from TVA …." (*Id.*).

4. The June 11, 1998 "Stop It Now" Note

Overall testified that the note made him "real nervous, real shaky," and that he was "frightful of – if the person could be around the truck watching me or something" (FoF ¶ 94).

5. The June 26, 1998 Whistle Telephone Call

Overall gave no testimony as to whether this incident detrimentally affected him.

6. The August 5, 1998 Wiggall Comment

Wiggall told Overall, "[w]e're here as engineers not to make up problems, but [to] find them and correct them" (FoF ¶ 137). Overall testified that, as a whistleblower, he interpreted Wiggall's comment to be retaliatory, and a warning, "like don't – don't do anything wrong while you're here" (*Id.*).

7. The August 27, 1998 Typewritten Note

Overall testified that the note made him "very upset" and that he "hollered over to my cubicle mate next to me" and "[threw] the note to the floor in disgust and anger" (FoF ¶ 143). Overall testified that he started to cry and that he was upset because the note was a direct threat indicating that if he did not leave Watts Bar, some other retaliatory action would take place (*Id.*).

8. The August 29, 1998 Voice Mail

Overall testified that the voice mail message "struck me bad and really hard mentally" in light of the notes and other incidents that had occurred (FoF ¶ 148).

9. The September 4, 1998: Message on Bathroom Wall

Overall testified that the bathroom stall writing did not affect him "very strong," because he "hadn't seen the note or whatever was written on the wall" (FoF ¶ 154).

10. The September 6, 1998 "Did you get

Overall testified that he felt that the note "was threatening in nature," and "based on the past messages I had received, this was escalating up to a point of – of someone was going to probably do something to me, harm me, kill me or whatever" (FoF ¶ 110).

11. The September 9, 1998 Fake Bomb

Overall was taken directly to the hospital because he was experiencing chest pain (FoF ¶ 116). Overall testified that he was "real anxious and worried" and "scared with what was going on" (*Id.*). Following the incident and his hospitalization, Overall allegedly attempted suicide (FoF ¶ 118), and sought psychological treatment for stress and depression (FoF ¶ 119).

12. The December 21, 2000 "you need to go" Note

Overall testified that he was "shocked" when he saw a photocopy of the note, and was "concerned," because he thought the note "related back to the other notes trying to remove me from TVA altogether" (FoF ¶ 133).

Taken as a whole, there are numerous examples which show that Overall was personally, emotionally affected by the ongoing, frequent, and sometimes severe nature of the harassment and retaliation being leveled against him. I find that the third element is satisfied.

iv. The retaliation would have detrimentally affected other reasonable whistleblowers in that position

The fourth element, whether the retaliation would have detrimentally affected other persons in the same position, is to

be reviewed from the perspective of a reasonable whistleblower, not that of a bystander. *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 81 (1998); *Smith v. Esicorp., Inc.*, Case No. 93-ERA-16, at 13 (Sec'y Mar. 13, 1996).

Given the twelve incidents of alleged harassment that occurred over a 3½-month period, and given that two of the incidents (the "SILKWOOD" note and the "fake bomb") can be inferred to be physically threatening in nature, I find that the proximity and nature of the incidents in question would have detrimentally affected a reasonable person in Overall's position. The fourth element establishing *prima facie* hostile work environment is satisfied.

v. *Respondeat superior* liability

Regarding the fifth element, *respondeat superior* liability, the Supreme Court has held that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." *Faragher v. City of Boca Raton*, 524 U.S. 775, 777 (1998). "It makes sense to hold an employer vicariously liable … for some tortuous conduct of a supervisor made possible by use of his supervisory authority …. In a sense a supervisor is always assisted in his conduct by the supervisory relationship." *Id.*

"None of the reasons for holding the employer vicariously liable is extant [however], when the harassment is conducted anonymously." *Webb v. Federal Express Corp.*, No. 97-2687 MI/V (W.D. Tenn. August 9, 1999), aff'd on other grounds, *Newman v. Fed. Express Corp.*, 266 F.3d 401 (6th Cir. 2001). "With respect to anonymous communications, there is no indication of an abuse of supervisory authority which could merit the imposition of vicarious liability on the employer." *Id.*; *see also, Hixson v. County of Alameda Sheriff's Dept., et al.*, 1999 WL 305513 *11 (N.D.Cal. May 12, 1999) (holding that there is no remedy for "anonymous incidents" such as threatening phone calls and car vandalism, "since there is no evidence that these incidents were tangible employment actions attributable to the [employer]"); *Gibson v. American Library Ass'n*, 846 F.Supp. 1330, 1341 (N.D.Ill. 1993) (dismissing a constructive discharge claim because the complainant did not know who left an alleged harassing voice mail); *Ward v. City of Streetsboro*, 89 F.3d 837, 1996 WL 346812 **3 (6th Cir. 1996) (noting that "the person or persons responsible for the [harassing] incidents were, and still are, completely unknown." As such, there was no vicarious liability to be determined.).

In the instant case, there are twelve incidents held to be harassing behavior. The August 5, 1998, comment by Wiggall is discussed below. Of the remaining eleven events, eight took the form of anonymous notes (FoF ¶¶ 87, 92, 94, 110, 133, 143, 153), two were anonymous telephone calls with continuous whistle sounds (FoF ¶¶ 80, 103, 148), and one was the anonymous "fake bomb" incident (FoF ¶ 112). While I previously found that these incidents were in response to Overall's engagement in protected activity, Overall has offered no evidence that any of these incidents were perpetrated by or for TVA supervisors. As such, these incidents are insufficient to support a *respondeat superior* liability claim.

Overall asserts that Smith, and thus TVA, "was continuing to monitor [Overall's] activities, even though Mr. Overall was on leave" in an attempt to prohibit Overall from attending and speaking at the D.C. Cook rally (Complainant's Post-Hearing Brief, p. 85).

In August 1999, while on paid administrative leave, Overall was invited to attend a rally to discuss complaints and problems at the D.C. Cook plant (FoF ¶ 181). Smith's secretary received a call from an acquaintance at the D.C. Cook plant, who informed her that there was going to be an "ice condenser protest" at the D.C. Cook plant and that Overall was to be participating (FoF ¶ 182). Smith's secretary passed this information on to Smith (FoF ¶ 182).

Smith was concerned that Overall might be involved in the protest while receiving paid administrative leave from Watts Bar (FoF ¶ 183). He asked his counterpart at the D.C. Cook plant to contact him if he knew anything about the participants in the protest (FoF ¶ 183). In response to his request for information, Smith received an e-mail in August 1999 from "somebody in public relations at the D.C. Cook plant," which stated that a TVA whistleblower was scheduled to attend a protest.

The e-mail also included the website address of the protest (FoF ¶ 183). Suspecting that Overall was the TVA whistleblower involved in the protest, Smith viewed the protest website. Overall had declined to participate in the rally; however, it was erroneously announced on the internet website that Overall was scheduled to participate in the rally (FoF ¶ 181). Smith copied the information from the protest website, and he forwarded it to James Maddox, the Manager of Nuclear Engineering, and to Higginbotham (FoF ¶ 183).

Incidents of harassment "must be repeated and continuous; isolated acts or occasional episodes will not merit relief." *Carrero v. New York City Housing Authority*, 890 F.2d 569, 577 (2nd Cir. 1989) citing *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1189 (2nd Cir. 1987). Here, Overall has produced evidence of only one incident of allegedly improper monitoring. Such an isolated incident does not meet the threshold for establishment of a hostile work environment. There is no showing that Smith was actually monitoring Overall's whereabouts. Smith inquired about the D.C. Cook rally and Overall's alleged participation only after being directly informed that there may be a conflict of interest between Overall's activity and being on paid administrative leave. There was no evidence presented that Smith was routinely, repeatedly, or continuously watching Overall's movements.

Second, Overall has failed to show how this incident produced a tangible job detriment or a change in Overall's compensation, terms, conditions, or privileges of employment. *See Berkman, supra*. There is no evidence presented that TVA attempted to impact or alter Overall's alleged plans to participate in protected activity. Smith reviewed a public rally internet website, and he then forwarded this information to his manager and to Higginbotham. TVA neither took nor contemplated taking action regarding Overall's possible participation at the D.C. Cook rally.

Although Smith was a supervisor, as contemplated by *Faragher*, his actions do not constitute harassment or retaliation, nor did Smith's actions change the conditions of Overall's employment with TVA.

This leaves only the August 5, 1998 comment by Wiggall (FoF ¶ 137). "Foul language in the work place, although not condoned by the Court and though certainly well beyond the boundaries of polite behavior, does not satisfy the [severe and pervasive] test enunciated in *Harris*. *Williams v. General Motors Corp.*, 187 F.3d 553, 562 (6th Cir. 1999). Further, "mean behavior, without more, does not equate to a … hostile work environment." *Id*. Wiggall was Overall's second-level supervisor (FoF ¶ 73), thus satisfying *Faragher's* requirement of an immediate or higher level supervisor. *Faragher*, 524 U.S. at 777. Upon Overall's return to Watts Bar, Wiggall stated to Overall, "we're here as engineers to not make up problems but [to] find them and correct them" (FoF ¶ 137). While this statement could be related to Overall's protected activities, it is mild in nature and it does not even reach the level of foul language or mean behavior cited above which Courts find do not constitute severe or pervasive behavior incident to a hostile work environment.

When reviewing the totality of the anonymous and employee incidents with the actions taken by Smith and the Wiggall comment (both of which can be tied to a TVA supervisor), I find that Overall has failed to establish TVA's *respondeat superior* liability. As such, Overall has failed to establish a *prima facie* case of hostile work environment based upon vicarious liability.

3. Did TVA Properly Investigate Overall's Allegations of Harassment?

Where a complainant fails to link the harassment to a manager or supervisor, the Court may only invoke the lower standard of showing that the employer will be liable for its own negligence in dealing with claims of harassment. *Varnadore v. Oak Ridge Nat'l Lab.*, ARB No. 99-121, 1992-CAA-2 and 5, 1993-CAA-1, 1994-CAA-2 and 3, 1995-CAA-1, at 8 (ARB July 14, 2000). The plaintiff must show that the employer "knew or should have known of the … harassment and failed to implement prompt and appropriate corrective action." *Hafford v. Seidner*, 183 F.3d 506, 513 (6th Cir. 1999).

Overall admits that TVA conducted an investigation, conducted various stand down meetings, and issued various bulletins regarding harassment, but argues that all of this activity had no effect in stopping the harassment. (Complainant's Post-Hearing Brief, p. 71). Such a result is not, however, required by the law. Generally, a response to harassment is adequate if it is *reasonably calculated* to end the harassment. *Jackson*, 191 F.3d at 663 (emphasis added). The question, therefore, is not whether TVA was able to stop the harassment, but rather whether TVA took prompt and appropriate corrective action that was reasonably calculated to end the harassment.

a. TVA Actions Prior to Overall's Return

TVA took extensive steps prior to Overall's return to Watts Bar that were reasonably calculated to prevent new harassment, including: (1) issuing an April 16, 1998 site bulletin titled, "Bulletin from Watts Bar Nuclear Plant" to reinforce TVA's zero-tolerance policy on intimidation and harassment, and to encourage individuals to identify and raise concerns (FoF ¶ 45); (2) Purcell conducted a meeting with his direct subordinates where he reinforced TVA's "zero tolerance for intimidation or harassment" (FoF ¶ 71); (3) TVA management's preparation of the "Plan for Returning Overall to WBN," consisting of a memorandum detailing important concerns and issues involving Overall's

return to work at Watts Bar (FoF ¶ 67); (4) the issuing of Scalice's memorandum for managers detailing the important concerns and issues regarding Overall's return to work (FoF ¶ 70); (5) Higginbotham's meeting with Adair, McCollum, and McCormick, wherein Higginbotham implored them to treat Overall with respect, and to realize that he may be sensitive to some issues (FoF ¶ 68); (6) Scalice's meeting with the Human Resources staff, wherein he emphasized that Overall was not to be subjected to retaliation or harassment (FoF ¶ 63); (7) Purcell's issuance of a memorandum which emphasized that retaliation against Overall would not be tolerated (FoF ¶ 64); and, (8) Wiggall's meeting with the Systems Engineering group, where he emphasized the zero-tolerance policy on harassment (FoF ¶ 66).

b. TVA Response to Anonymous Off-site Harassment

On June 3, 1998, TVA Nuclear formally requested that TVA OIG initiate an investigation into Overall's allegations of harassment (FoF ¶ 171). This investigation was assigned to Agent Holloway who had extensive training and has been with TVA OIG since its inception in 1986 (FoF ¶ 172). Holloway prepared an initial investigation plan that included installation of a night vision camera near the Overall residence and the installation of telephone recording equipment, but she later revised that plan when installation of the camera proved impractical and Overall's caller-ID system recorded all incoming telephone numbers (FoF ¶ 173).

TVA responded to every off-site alleged incident of harassment in a reasonable way given the information provided by Overall. In many instances, there was no information provided by Overall which could have allowed further investigation by TVA (See FoF ¶¶ 85, 86, 96, 105, 107, 109).

Overall argues that Holloway's reliance on the caller-ID system was inappropriate because the caller-ID gave incoming telephone numbers only and did not allow voice recordation of the call itself (Complainant's Post-Hearing Brief, pp. 101-102). This argument is weak in that two of the calls consisted only of whistles being blown continuously, thereby offering no voices to be analyzed (FoF ¶¶ 80, 103). The perverted laughing/breathing call (FoF ¶ 98), also was without spoken words. The September 2, 1998 phone call (FoF ¶ 109), appears to have included a spoken conversation between Amanda Overall and the caller, but Overall did not raise this issue in his complaint. There is nothing in this call suggestive of harassment or retaliation, and there is no indication that this number was ever forwarded to TVA for further investigation.

Concerning the three harassing telephone calls made to Overall's house from nearby pay phones (FoF ¶¶ 80, 98, 103), TVA subpoenaed telephone records for the numbers provided and followed up by reviewing other calls made from that pay phone or by investigating nearby businesses for leads (FoF ¶¶ 82, 99, 104).

The anonymous handwritten notes (FoF ¶¶ 87, 92, 94, 106, 133), were reviewed by TVA OIG and in many cases by the Cleveland Police Department and the FBI (FoF ¶¶ 87, 93, 95, 98, 110, 132, 136, 174). Both sides have spent considerable time and expense having those notes extensively reviewed by handwriting experts. Despite investigation by TVA, local law enforcement, the FBI, and several handwriting experts, no author has been identified in any of these notes.

Investigation of the "harassing" Buick Riviera (FoF ¶ 100), revealed that the driver was a Tennessee State Trooper who owned rental property in the area (FoF ¶ 102). Investigation of the S-10 Pick-up Truck (FoF ¶ 127), revealed an alarm company employee driving through the neighborhood on the way to a service call nearby (FoF ¶ 131).

Finally, the "fake bomb" investigation involved TVA OIG, the FBI, the Bureau of Alcohol, Tobacco, and Firearms, the Cleveland Police Department, and the Chattanooga Bomb Squad (FoF ¶¶ 114, 120, 125).

The investigation of all these events by TVA, along with parallel investigations being performed by the Cleveland Police Department, the FBI, and the Bureau of Alcohol, Tobacco, and Firearms, provided no indication of who was behind these incidents and provided no leads on how to stop the perpetrator(s). Subsequent review of the notes by handwriting experts did not provide assistance in identifying the author. I find that TVA engaged in prompt and appropriate action in dealing with the off-site incidents of harassment against Overall.

4. TVA's Response to Harassment at Watts Bar

Of the twelve harassing incidents discussed above, only four occurred at the Watts Bar facility. Each was handled by TVA in a prompt and appropriate manner.

a. The August 5, 1998 Wiggall Comment

As discussed above, Wiggall's comment (FoF ¶ 137), does not rise to the level of harassment in the eyes of the law. *See Williams, supra*. Even so, Wiggall had the foresight to see the potential mistake in his choice of words, and he offered a quick apology during the same conversation (*Id*.).

b. The August 27, 1998 Typewritten Note

Overall cites *Allen v. Michigan Department of Corrections*, 165 F.3d 405 (6th Cir. 1999) in support of his assertion that anonymous notes on departmental forms can be attributed to the employer (Complainant's Post-Hearing Brief, p. 187). In *Allen*, the plaintiff was being actively harassed by at least two of his supervisors through the use of abusive counseling memorandums and direct racial insults. *Id*. at 408, 410, 411. During this period of racial harassment, Allen received an anonymous harassing note on departmental forms signed by the "KKK." *Id*. at 411. The Court held that "although the [note on the departmental form] could not be directly attributed to Allen's supervisors, there is at least an inference that the supervisors condoned the action …. Moreover, the supervisors themselves could not be ruled out as the perpetrators given their racially motivated insults directed at Allen." *Id*. Given the direct, abusive behavior by Allen's supervisors, the case was remanded to determine if the employer, by not acting on the supervisor's behavior, tolerated or condoned the harassing behavior. *Id*. at 412.

Allen is easily distinguished from the instant case. Other than Wiggall's comment when Overall return to Watts Bar (FoF ¶ 137), Overall has not produced evidence that any TVA supervisor directly harassed him through abusive insults or through direct actions, such as the counseling memos in *Allen*.

Unlike the employer in *Allen*, TVA responded immediately to the inter-office note. Purcell responded to the August 27, 1998 "LEAVE WATTS BAR, THERE IS NO ROOM FOR WHISTLEBLOWERS HERE OR ELSE" note (FoF ¶ 143), by meeting with the entire Human Resources staff the next day, August 28, 1998, to discuss the issue of harassment and specifically, Overall's situation (FoF ¶ 144). Purcell restated TVA's policy of zero-tolerance for any harassment, and he published TVA's harassment policy down through the work force via a memorandum (*Id*.). Purcell notified the NRC of the actions taken (*Id*.). TVA OIG loaned the note to the NRC Office of Investigations for further review (FoF ¶ 145). The NRC, in its investigation, conducted

interviews of twelve individuals and then returned the document with a forensic report (*Id.*).

TVA responded promptly and appropriately to the August 27, 1998 typewritten note delivered via inter-office mail.

c. The August 29, 1998 Voice Mail Message

Overall cites *Hafford v. Seidner*, 183 F.3d 506 (6th Cir. 1999) to support its position that anonymous harassing phone calls made on workplace telephones are the responsibility of the employer (Complainant's Post-Hearing Brief, p. 187). In *Hafford*, the employee received harassing and threatening phone calls over the company's internal phone system. *Id.* at 509. In response to receiving these calls, Hafford alerted supervisors that, through his own investigation, he suspected certain employees of being responsible for the phone calls in question. *Id.* at 510. The employer did not question the employees named, nor did it take any investigative action. *Id.* The Court held that summary judgment for the employer was, therefore, inappropriate because a fact finder could find that the employer failed to take prompt and appropriate corrective action. *Id.* at 514.

Unlike the employee in *Hafford*, Overall did not receive harassing and threatening phone calls over the company's internal phone system which would have allowed investigation by TVA. TVA OIG promptly investigated the harassing message left on Overall's voice mail (FoF ¶ 148), but as TVA's phone system uses a central telephone trunk line and there was no voice to review (only a whistle being blown), TVA could not trace the phone call to a source (FoF ¶ 149).

Unlike the employer in *Hafford*, TVA responded promptly and appropriately to the August 29, 1998 voice mail message. The nature of the call (whistle being blown) and the technical lay-out of the TVA phone system prevented further meaningful action from being taken by TVA.

d. The September 4, 1998 Message on the Bathroom Wall

Overall cites *Moore v. KUKA Welding Sys. & Robot Corp.*, 171 F.3d 1073 (6th Cir. 1999) in support of his proposition that TVA is responsible for anonymous notes written on bathroom stalls (Complainant's Post-Hearing Brief, p. 187). Moore was the only African American worker in a shop of 15-20 employees. *Moore v. KUKA Welding Sys. & Robot Corp.*, 171 F.3d 1073 1077 (6th Cir. 1999). During a period of racially harassing incidents, someone

wrote "kill all niggers" on the shop's bathroom wall. *Id.* An employee found the slur and wiped the wall clean. *Id.* Upon reporting the slur to a supervisor, the supervisor responded that the plaintiff had probably written the note himself, even though the supervisor knew that Moore was not even at work on the day in question. *Id.* The Court held that Moore had established a hostile work environment, not upon the existence of the bathroom wall slur, but rather on the employer's tolerance of a work place where "racial slurs and offensive jokes were part of the every day banter on the shop floor." *Id.* at 1079. The Court pointed out that the employer "knew about the jokes and racial slurs and did little to correct this problem and in some cases took part in or implicitly condoned the conduct." *Id.* The Court then cited the supervisor's fabricated and obviously factually incorrect response to the bathroom wall slur as an example of the employer condoning such activities. *Id.*

Unlike the employer in *Moore*, TVA responded immediately to the bathroom note. Upon discovery of the "GO HOME ALL WHISTLEBLOWERS NOW" note scrawled on a bathroom stall (FoF ¶ 153), a supervisor posted an "out of order" sign on the stall to prevent further spread of the harassing message throughout the building (*Id.*). Pictures were then taken of the writing, and then the wall was immediately painted to remove the harassing message from the restroom (*Id.*).

Unlike the employer in *Moore*, Overall has not presented evidence that TVA supervisors condoned harassing whistleblower statements as "part of every day banter," nor has evidence been presented that TVA officials "took part in or implicitly condoned" such conduct.

The incident was turned over to Holloway and TVA OIG for further investigation. Holloway did not inspect the wall for fingerprints because the restroom was in a public area and was used daily by so many employees (FoF ¶ 155). Further, as the incident was found around 9:30 a.m., Holloway determined that review of sign-in records would have been a time consuming and fruitless task, as almost every employee was in the building by 9:30 a.m. each morning (*Id.*).

TVA responded to the September 4, 1998 bathroom note in a prompt and appropriate manner given the timing, location, and nature of the harassing message.

e. The August 1998 Dennis Tumlin Comment

Like the August 5, 1998 Wiggall comment, the August 1998 Dennis Tumlin comment (FoF ¶ 138), "there's that whistleblower" did not rise to the level of harassment. *See Williams, supra* ("mean behavior, without more, does not equate to a … hostile work environment."). Nevertheless, Higginbotham took the "whistleblower" statement made by Tumlin seriously, and he counseled both Tumlin's manager and Tumlin himself regarding how the joke was inappropriate and how such language could be misinterpreted (*Id.*).

As discussed above, I have determined that TVA responded appropriately in preparing for Overall's return to Watts Bar and in investigating the off-site incidents of harassment against Overall. While stating again that Wiggall's comments did not rise to the level of harassment, I find it relevant that TVA's on-site incidents of harassment were limited in time from August 27, 1998 through September 4, 1998, Overall's last day at Watts Bar. During this nine day period, TVA responded to each on-site incident in a timely and appropriate manner. Further, after Overall's off-site September 9, 1998 "fake bomb" incident, and while Overall was still on administrative leave, Purcell conducted a September 15, 1998 stand-down meeting with all Watts Bar employees, which included a slide presentation about the threats that had been made against Overall (FoF ¶ 126).

I find that TVA responded promptly and appropriately with actions that were reasonably calculated to end the incidents of harassment that occurred at Watts Bar. Therefore, Overall has failed to show that TVA acted negligently in responding to incidents of harassment or retaliation against him.

VI. CONCLUSION

Based upon the foregoing, Curtis C. Overall has failed to prove discrimination through harassment or retaliation evidenced by an adverse employment action or tangible job detriment, and he has failed to prove that TVA subjected him to a hostile work environment. Therefore, his claim must fail without further review.

VII. RECOMMENDED ORDER

IT is recommended that the complaint filed by Curtis C. Overall be DISMISSED.

A

Robert L. Hillyard
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 20 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.7 and 24.8.